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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1947~~ 1948

No. ~~626~~ 27

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL., APPELLANTS,

vs.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

FILED FEBRUARY 25, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 626

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL., APPELLANTS,

vs.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 14, 1948.

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In The

Supreme Court

of the

State of Arizona

AMERICAN FEDERATION OF LABOR; ARIZONA STATE FEDERATION OF LABOR; PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; MILLMEN, CABINET MAKERS AND LUMBER HANDLERS UNION No. 2093; FOREST L. STIERS, individually and as President of LOCAL UNION No. 2093, and RALPH HENLEY, d.b.a. RALPH HENLEY MILLWORK,

Appellants,

vs.

AMERICAN SASH & DOOR COMPANY, a Corporation; D. A. BREWER; W. B. STEVENS; EDWARD L. BEARD; JAMES R. MILLER, and JOHN L. SULLIVAN, individually and as Attorney General of the State of Arizona,

Appellees.

} No. 5028

ABSTRACT OF RECORD

J. H. MORGAN,
H. S. McCLUSKEY,
Phoenix, Arizona,

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
Washington, D. C.

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Phoenix, Arizona

Attorneys for Appellants.

Filed in the Supreme Court this.....day of

....., 1947.

.....

Clerk of Supreme Court

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In The

Superior Court

of the

State of Arizona

In and for the County of Maricopa

AMERICAN FEDERATION OF LABOR: ARIZONA STATE FEDERATION OF LABOR: PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL: UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; MILLMEN, CABINET MAKERS AND LUMBER HANDLERS UNION NO. 2093; FOREST L. STIERS, individually and as President of LOCAL UNION NO. 2093, and RALPH HENLEY, d. b a. RALPH HENLEY MILLWORK.

Plaintiffs and Representative of a Class.

vs.

AMERICAN SASH & DOOR COMPANY, a Corporation; D. A. BREWER; W. B. STEV-

No. 57575

Division 1

ENS, EDWARD L. BEARD; JAMES R. MILLER, and JOHN L. SULLIVAN, individually and as Attorney General of the State of Arizona,

Defendants and Representative of a Class.

COMPLAINT FOR DECLARATORY JUDGMENT AND EQUITABLE RELIEF.

Filed: Feb. 12, 1947.

Come now plaintiffs above named, by their undersigned attorneys, and for cause of action against defendants, above named, allege:

I.

THE NATURE AND PURPOSE OF THIS ACTION

This is a suit of a civil nature, brought under the Arizona Declaratory Judgment Act (Art. 7, Chap. 27, A.C.A. 1939) to obtain a declaratory judgment in respect to the interpretation, effect and legality of the so-called "Anti-Closed-Shop Amendment" to the Arizona Constitution, and brought also to obtain certain equitable relief within the equity

jurisdiction of the Arizona courts. The rights, status and legal relations of the parties herein are affected by the adoption of such amendment to the Arizona Constitution, and the rights, status and duties and obligations of such parties have been made uncertain and insecure by reason of such amendment, all as more fully hereinafter set forth. The purpose of this action is to obtain a declaration of the rights, duties and obligations of such parties under such amendment and, in addition, to obtain equitable relief against the defendant law enforcement officials, as more fully hereinafter set forth.

The amendment in question, commonly called and hereinafter referred to as the "Anti-Closed-Shop Amendment," was ratified by referendum vote of the people of the State of Arizona in November of 1946 as an amendment to the Constitution of the State of Arizona. Such law purports to prohibit any form of union-shop provision in existing or future collective bargaining agreements between employers and representatives of employees. The term "union shop" or "union security" agreements, as used in this complaint, includes any and all agreements between employers and labor organizations or other representatives of employees wherein membership in a labor organization is required as a condition of employment.

The issues are the construction and validity of the said Amendment, as well as the constitutional rights of the plaintiffs and their constitutional immunities, and the rights and obligations of the parties hereto under said Amendment.

II.

THE PLAINTIFFS, THEIR FUNCTIONS AND RIGHTS

1. At all times herein mentioned, the plaintiff, American Federation of Labor, was and now is a voluntary and unincorporated association composed of numerous voluntary and unincorporated associations or labor unions, the said affiliated associations having an aggregate membership of several million persons in all States of the United States, including the State of Arizona and in Canada, and all of said members are classified accordnig to their various trades and industries into separate, voluntary and unincorporated associations or labor unions. The American Federation of Labor maintains its principal office in the City of Washington, District of Columbia, and William Green is its president.

2. At all times herein mentioned, the plaintiff, Arizona State Federation of Labor, was and now is a voluntary and unincorpor-

ated association composed of numerous voluntary and unincorporated associations or labor unions, known as national or international unions and their local unions affiliated with the American Federation of Labor, operating in the State of Arizona. The Arizona State Federation of Labor has its headquarters in the City of Phoenix, State of Arizona, and A. E. Williams of that City is its president.

3. At all times herein mentioned, plaintiff Phoenix Building and Construction Trades Council, was and now is a voluntary and unincorporated association composed of numerous voluntary and unincorporated associations, or labor unions, known as national and international unions, and their local union affiliates, affiliated with the American Federation of Labor and the Arizona State Federation of Labor, operating in the State of Arizona and whose members are employees engaged in various building and construction trades in the State and particularly in the City of Phoenix. It has its headquarters in the City of Phoenix, State of Arizona, and A. E. Williams, of that city, is its President.

4. The plaintiffs American Federation of Labor, the Arizona State Federation of Labor, and the Phoenix Building and Construction Trades Council include among their affiliated organizations local and national labor

unions, as more particularly described as plaintiffs, *infra*, which have been designated and selected as collective bargaining representatives by a majority of employees of each of many employers in appropriate collective bargaining units in the State of Arizona, and a large number of such local and national unions presently are parties to, or desire or are about to become parties to, various types of union-shop or union-security contracts with various employers throughout the State of Arizona and in the City of Phoenix. Such plaintiffs bring this action on behalf of such affiliated labor organizations operating within the State of Arizona and their members, labor organizations and members being too numerous to bring in as parties, the interest of such labor organizations, and the members thereof, however, being similar.

5. At all times herein mentioned, the plaintiff United Brotherhood of Carpenters and Joiners of America (international Union) was and now is a voluntary, unincorporated association of employees employed in the carpentry trade and constitutes an International labor organization. It has a total membership of approximately 2,000,000 such employees in numerous states of the United States and Canada, including approximately 3,000 in the State of Arizona. Its president is William L. Hutcheson. It maintains its

principal office in the City of Indianapolis, State of Indiana, and it is affiliated with the plaintiff's American Federation of Labor, the Arizona State Federation of Labor, and the Phoenix Building and Construction Trades Council. Its members are organized into autonomous subdivisions known as local unions, a number of which are located in Arizona and consist, in whole or in part, of residents of the State of Arizona employed in such trade.

6. At all times herein mentioned, the planitiff Millmen, Cabinet Makers, and Lumber Handlers Union No. 2093, hereinafter referred to as Local Union No. 2093, is such a local union affiliated with the plaintiff United Brotherhood of Carpenters and Joiners of America and is located in the City of Phoenix, Arizona. Plaintiff Forest L. Stiers is its President.

7. At all times herein mentioned, the plaintiff Forest L. Stiers was and now is a citizen of the United States and a resident of the City of Phoenix, State of Arizona, and a member of Local Unon No. 2093, Millmen, Cabinet Makers, and Lumber Handlers, and the American Federation of Labor, affiliated with the plaintiff union United Brotherhood of Carpenters and Joiners of America and the American Federation of Labor. He was

and is an employee of defendant American Sash and Door Company, a corporation organized and operating under the laws of the State of Arizona.

8. All plaintiff unincorporated labor associations are organizations and associations of employees, including workingmen and women, in various trades, occupations and industries, who have from time to time assembled and associated together and are assembling and associating together for the purpose of organizing themselves into voluntary and unincorporated associations, for the purpose of forming, joining and assisting their organizations so formed, including the plaintiff labor organizations herein named, to bargain collectively through representatives of their own choosing, for purposes of mutual discussion and common consultation, and for dissemination of ideas and information to the membership and the general public, and to engage in concerted activities for the purpose of collective bargaining and otherwise dealing with their employers concerning hours of employment, rates of pay, working conditions or grievances of any kind relating to employment, and, in particular, the securing and obtaining of union-shop agreements providing for and insuring union security and protection, all for their mutual aid and protection, and for the purpose, by

these and other means, of protecting themselves and improving their working conditions, wages and employment relationships. All plaintiff unincorporated labor associations, both national and local, are of the type commonly regarded and denominated as labor unions.

9. Such national and international labor organizations, including the United Brotherhood of Carpenters & Joiners of America, and their local union affiliates, including Millmen, Cabinet Makers and Lumber Handlers Union No. 2093 and Phoenix Building and Construction Trades Council, affiliated with plaintiff American Federation of Labor and plaintiff Arizona State Federation of Labor, have had for many years in the past, and have at the present time, large numbers of union-shop or union-security agreements with various employers in a large number of trades and industries throughout the United States and throughout the State of Arizona. The use of union-shop or union-security agreements by such labor organizations is extremely widespread throughout the United States, as more specifically seen in an official publication of the United States Department of Labor known as Bulletin No. 829, entitled "Extent of Collective Bargaining and Union Status, January 1945," attached hereto as Exhibit "A" and made a part hereof as if

specifically set forth. Labor organizations affiliated with plaintiff Arizona State Federation of Labor, including plaintiff labor organizations herein, have approximately twenty-five hundred union-security agreements embracing approximately twenty-six thousand employees employed by various employers in various trades and industries throughout the State of Arizona. Such agreements are with employers engaged largely in non-agricultural industries, trades and services. Some of these agreements are with employers engaged in interstate commerce, and some are with employers engaged in intra-state commerce. Such labor organizations, as well as all other labor organizations which are a part of the American trade union movement, have traditionally entered into such union-shop agreements for purposes of security and protection and as a means of achieving equality of bargaining power, and the union-shop status is a traditional subject matter of collective bargaining in the state of Arizona, and throughout the United States and has been since the first days of the American trade union movement.

10. The obtaining of union-security provisions in collective bargaining agreements between labor organizations and employers now constitutes, and for over 100 years has constituted, an ultimate objective of the as-

sociation of working people, including the individual plaintiffs herein, into labor organizations and of such organizations themselves, including the plaintiff labor organizations. The securing of such agreements is a necessary and indispensable concomitant of the assemblage of working people, including the members of plaintiff associations and the individual plaintiffs herein, into labor organizations, and the right of labor associations, including plaintiff associations, to maintain and obtain such agreements, constitutes a necessary and indispensable element of their proper functioning and for the fulfillment of their purposes, as heretofore set forth.

11. Such union-shop or union-security agreements, including the agreements involved in this case hereinafter set forth, and the right to enter into them constitute valuable property and civil rights in plaintiffs, for the following additional reasons: The union-shop or union-security agreement constitutes the most effective means of obtaining and securing for plaintiff labor organizations, their members, and the individual plaintiff union members herein:

(a) Job security and protection from employer discrimination by removal of motives to discharge or demote because of union activity.

(b) Equality of bargaining power, with consequent betterment of working conditions by insuring labor a united front in the contest for a fair share of the joint products of capital and labor.

(c) Protection of working standards by preventing cut-throat wage competition by non-union employees.

(d) Equality of sacrifice by insuring that all who enjoy union wages and working conditions, achieved through years of struggle and deprivation, share in the costs of such benefits as members of the union rather than as "free riders."

(e) An increased measure of union responsibility for their obligations under collective bargaining agreements by providing a means of imposing disciplinary action.

(f) Elimination of jurisdictional strife by safeguarding against raids and other disruptive tactics of rival labor organizations, and

(g) An ability effectively to police collective bargaining agreements to the

end of obtaining full compliance on the part of the employees embraced thereunder, it being impossible to secure such full compliance where some employees are not union members and thus not subject to union laws and discipline.

(h) Labor-management cooperation by eliminating the suspicion and hostility which often characterizes the initial stages of employer recognition, thereby freeing union energies and resources for constructive cooperation rather than defensive sparring.

12. In the exercise of their rights of association, free assembly and free speech, and liberty of contract, and in the effectuation of their purposes as aforementioned, the members of labor organizations, including plaintiff labor organizations herein mentioned and their affiliates and the individual plaintiff members, have reached joint agreement upon their mutual obligations and operations and have set forth such agreements in written constitutions and by-laws, which constitutions and by-laws have been duly adopted by the members of such organizations and by such organizations. Such constitutions and by-laws constitute the laws of such organizations, define the duties and obligations of

the members of such organizations, including the members of plaintiff organizations, one to the other and to the organization of which they are members, and prescribed conditions and qualifications for admission to and continuance in membership in such organizations. A number of labor organizations affiliated with plaintiff, American Federation of Labor, and the plaintiff, Arizona State Federation of Labor, have adopted in their constitutions provisions requiring as a condition of membership that members agree to work only with persons who are also members of the particular labor organization, and that they continue so to agree as long as they desire to retain their affiliation with said labor organization.

Specifically, plaintiff United Brotherhood of Carpenters and Joiners of America and the plaintiff Local Union No. 2093 have duly adopted provisions in their constitutions specifying the duties and obligations of the members of such organizations, and the members thereof, including the individual plaintiff and individual defendants, have subscribed thereto, and requiring that all persons desiring to obtain or retain membership in such organization shall work only with persons who are also members of such union. Such provisions are now, and were at all times herein men-

tioned, in full force and effect, and specify as follows:-

> "No agreement shall be made or renewed with any firm granting the use of the label after April 1, 1916, unless all shops and mills of the firm have an eight-hour workday and employs only members of the United Brotherhood, except where dispensation has been granted by the General President upon application from the District Council or Local Union."

No such dispensation has been granted in the State of Arizona.

13. For many years a substantial amount of the work performed in the building and construction industry in the State of Arizona and in the mills manufacturing sash and doors has been done through members of labor organizations affiliated with various building trades Councils similar to the plaintiff Phoenix Building and Construction Trades Council and including such plaintiff Council. Throughout the years a practice and tradition has existed in such building trades industry and in mills manufacturing sash and doors resulting in benefits to building trades employers, building trades employees, and the general public, whereunder the labor organizations involved, including plaintiff

Phoenix Building and Construction Trades Council, undertake to train and supply the various skilled craftsmen and also to train veterans of World War II under the G. I. Bill of Rights and to require and enforce standards of competence and diligence among employees who are members of such labor organizations and to insure stability of wage scales during the life of individual contracts on construction projects. The foregoing was and is accomplished solely through the medium of union-shop agreements. The same practice and tradition is prevalent generally throughout the larger cities of the United States. Such practice and tradition has resulted in inestimable benefits to the public generally through stabilization of the industry and the making available of skilled help, and to employers and employees including the plaintiff and defendant employees herein mentioned. It would be impossible for such practice and tradition to continue or to be maintained in such building trades industries without the institution of the union-shop, closed-shop, or union-security agreement.

14. Membership in plaintiff labor organizations, including the plaintiff United Brotherhood of Carpenters and Joiners of America and plaintiff Local Union No. 2093, as well as all other labor organizations operating in the State of Arizona, is open to all qualified

persons, and such organizations freely admit qualified applicants into membership and impose no arbitrary or unreasonable requirements as a condition to membership. All of such labor organizations welcome and admit to their ranks all persons in the respective lines of work who can meet the requirements as to skill prescribed by such organizations and who will submit to the discipline and by-laws of such unions and who are of good character and agree to fulfill the contracts entered into by said unions.

15. No labor organization in the State of Arizona, including the plaintiff labor organizations herein, exercises or has any monopoly or control by reason of any union-shop, closed-shop, or union-security agreement, over the supply of labor in any trade, craft, occupation, or calling either in the State of Arizona generally or in any city or community within the State, including work involving the employment of millmen, cabinet makers and lumber handlers or other carpentry work.

16. The members of the plaintiff labor organizations and the officers, agents and employees of said organizations, the individual plaintiff, and the individual members of such organizations and of all other organizations of employee and all other labor organizations affiliated with plaintiffs American Federa-

tion of Labor and Arizona State Federation of Labor having members who are residents of the State of Arizona and are organized for the purpose of dealing with employers concerning hours of employment, rates of pay and working conditions, constitute a class situated similarly to the plaintiff labor organizations and the individual plaintiff union member in this case with respect to the matter heren alleged, and many of them are situated similarly to such plaintiffs, and are so numerous as to make it impossible or impractical to bring them all before this Court, but the rights and interests of all persons with respect to the things and matters in this complaint alleged are fairly represented by the plaintiff labor organizations and the individual plaintiff union member herein, and these plaintiffs have heretofore been authorized to represent said persons with respect to the matters in this complaint alleged and to bring this suit for and on behalf of themselves and all other organizations affiliated with the American Federation of Labor or with the plaintiff, Arizona State Federation of Labor, and persons, organizations and individuals similarly situated. Plaintiff labor organizations and the individual plaintiff union member herein bring this action on behalf of and as representative of the interests and rights of the individual members of such organizations who are citizens of the United

States and are residents of the State of Arizona.

17. At all times herein mentioned, the plaintiff, Ralph Henley, was and is an employer transacting business under the name of Ralph Henley Millwork, and was and now is engaged in the manufacturing of sash, doors, and fixtures in the City of Phoenix, State of Arizona, where he employs a number of mechanics and workmen. Said plaintiff is a resident of Maricopa County, State of Arizona. He procures a large part of the materials used in the manufacture of his products from states other than the State of Arizona, and sells a substantial portion of his products in states other than Arizona and in Arizona, and is engaged in interstate commerce.

18. The plaintiff, Ralph Henley, and numerous other employers similarly situated, who, as hereinafter alleged, have union-security agreements with labor organizations, have an interest in the maintaining and obtaining of such agreements for the reason that such agreements have resulted and presently result in stability of employment relationships, the promotion of harmony and cooperation as between employer and employees, the elimination of strife and discord both within the plant and as between rival

labor organizations, the making available of sufficient skilled, competent and experienced artisans through the training of apprentices, the stabilization of employees' compensation by the predetermination of applicable wage rates, all having the effect of and actually resulting in increasing production; in addition, the making and observance of such union-security agreements is an indispensable condition to the securing of a license to use a union label on manufactured products and thereby facilitating the manufacture and sale of said products and the use thereof in the State of Arizona and in other states.

III

THE DEFENDANTS

19. At all times herein mentioned, the defendant American Sash & Door Company is and was a corporation duly organized and engaged in doing business in the State of Arizona and was and is engaged in the manufacture of sash and doors in the City of Phoenix, State of Arizona, where it employs a number of workmen skilled in the carpentry trade. Said defendant procures a substantial part of the materials used in the manufacturing of its products from states other than the State of Arizona, and sells a substantial portion of said products in states other than the

State of Arizona and is engaged in inter-state commerce.

20. That at all times herein mentioned the defendant D. A. Brewer was and is a resident of Maricopa County, State of Arizona and was and is engaged in concrete construction work such as foundations, floors, driveways, sidewalks, etc., in connection with the construction of Veterans Housing, and other Housing Projects, in the city of Phoenix, county of Maricopa, State of Arizona. In connection with such business, he employs workmen who are members of the plaintiff Phoenix Building and Construction Trades Council. Such defendant obtains his materials used in connection with his construction business through purchase within the State of Arizona, and the construction jobs which he undertakes are all within the State of Arizona, and said defendant is engaged in intrastate commerce.

21. At all times herein mentioned, defendant W. B. Stevens was and now is an employee of defendant American Sash & Door Co., a corporation, and prior to January 1, 1947, was a member in good standing of plaintiff Local Union No. 2093.

22. At all times herein mentioned, defendant Edward L. Beard was and now is an

employee of defendant employer D. A. Brewer, and prior to December 1, 1946, was a member in good standing of plaintiff Phoenix Building and Construction Trades Council.

23. At all times herein mentioned, the defendant James R. Miller was and is now an employee of plaintiff employer Ralph Henley, and prior to January 1, 1947, was a member in good standing of plaintiff Local Union No. 2093.

23a. All of the defendants named in paragraphs Nos. 19 through 23 are joined as defendants because they are parties to collective bargaining agreements with various of plaintiff labor organizations, or because they are individuals whose employment status is affected by reason of such agreements, as hereinafter more specifically set forth. No relief of any nature is asked or sought as to such defendants, other than a declaration of rights, duties, obligations and status under existing or future union-security agreements.

24. The defendant John L. Sullivan is the duly elected, qualified and acting Attorney General of the State of Arizona and is authorized and empowered, and it is his duty, to take all steps necessary, including the institution of civil or criminal proceedings, to enforce all laws of the State of Arizona, includ-

ing the Constitution of that State and amendments thereto and the aforesaid anti-closed-shop amendment. Such defendant has general supervisory and directory powers over all county and other prosecuting attorneys within the State of Arizona whose functions it is to enforce the laws of the State.

IV.

THE UNION-SECURITY AGREEMENTS INVOLVED HEREIN

25. Several weeks prior to November 4, 1946, all the planing mill employees, except office workers, shipping clerks, and superintendents, employed by the defendant American Sash & Door Company in the operation of its plant in Phoenix, Arizona, such employees constituting an appropriate bargaining unit, selected plaintiff Local Union No. 2093 as their bargaining representative, and said Local Union No. 2093 has at all times since been the duly selected and exclusive bargaining representative of such employees in such bargaining unit.

On the 4th day of November, 1946, the said defendant company entered into a collective bargaining agreement with said plaintiff Local Union No. 2093, which agreement specified the wages, hours, and working condi-

tions of the employees employed by said plaintiff company in the aforesaid bargaining unit. Such agreement, by virtue of a supplemental agreement made and executed on the same date as the original, is effective and in force until January 7, 1948. Among other provisions relating to working conditions, such agreement contains a provision providing that, subject to the right of the Company to determine the competency of all persons hired,

> "Article III. The company agrees to have in their employ only employees in good standing with the Union." . . . "Employers agree that any employee who fails to maintain membership in the Union as provided in Section I above shall be discharged upon proper notice given by the Union."

Copy of said agreement and supplement thereto is attached hereto as Exhibit 2 and is hereby referred to and made a part hereof as though set out at length.

26. For more than one year prior to November 25, 1946, there has existed an agreement between defendant D. A Brewer and plaintiff Phoenix Building and Construction Trades Council providing for the wages, hours, and working conditions of all em-

ployees except clerical and supervisory employees employed by the defendant D. A. Brewer in his construction business. Among other provisions, said agreement contains a provision relating to union security identical to the union-security provision set forth in Exhibit 2 herein, and requiring said defendant to employ only members of the Phoenix Building and Construction Trades Council in the operation of his business, and to discharge any such employees who do not maintain their membership. Such agreement was last renewed on August 4, 1946 and is, by its terms, to remain in full force and effect until August 4, 1947, after which it is automatically renewed from year to year, subject to a thirty-day's notice of cancellation.

27. Several weeks prior to December 12, 1946, all the planing mill employees, except office workers, shipping clerks, and superintendents, employed by plaintiff Ralph Henley Millwork in his operations at his plant in Phoenix, Arizona, such employees constituting an appropriate bargaining unit, selected plaintiff Local Union No. 2093 as their bargaining representative, and said Local Union No. 2093 has at all times since been the duly selected and exclusive bargaining representative of such employees in such bargaining unit.

On December 12, 1946, the said plaintiff Ralph Henley, transacting business under the name of Ralph Henley Millwork, entered into a collective bargaining agreement with said Local Union No. 2093 containing the identical terms and conditions as those set forth in Exhibit 2, and heretofore referred to in paragraph 25. Such agreement is effective and in force until January 7, 1948.

28. At all times subsequent to May 1, 1913, plaintiff Arizona State Federation of Labor has been and now is the sole owner of the Arizona Labor Journal, a newspaper of general circulation, published, and distributed by it in the State of Arizona for the purpose of defining, explaining, advocating and defending the aims and purposes of the labor movement, one of which is the establishment, operation and maintenance of closed-shop, union-shop, or union-security agreements; that at all times herein mentioned said plaintiff, acting as an employer, has employed only persons who were union members, and has operated under closed-shop agreements in all employments relating to the said newspaper, and is now so operating. It is the permanent policy of such plaintiff not to operate said newspaper in any other manner. Such plaintiff has no desire to operate its said newspaper in any other manner; it does not desire to voluntarily retain in its employment

any employee who does not fully maintain his membership in good standing in his respective union. It proposes to deny employment to any person applying therefor who is not a member of his respective union and in good standing therein, and, subsequent to December 1, 1946, has so denied such employment to at least one applicant who was not a union member on that ground alone. In this respect such plaintiff alleges that its business, property, aims, and purposes would be unsafe and its operations jeopardized in the hands of persons who are not union men in good standing.

29. The collective bargaining agreements heretofore set forth were entered into by the respective parties voluntarily, and it is the desire of all parties to such contracts to continue such contracts in existence, if it is legal for them to do so.

V.

THE ANTI-CLOSED-SHOP AMENDMENT

30. On or about the 3rd day of July, 1946, there was presented to the Hon. Dan Garvey, Secretary of State of the State of Arizona, an initiative petition proposing to amend the Constitution of the State of Arizona, under

the provisions of Article IV, Part 1, and Article XXI, Constitution of Arizona; that said Dan Garvey, as said Secretary of State, determined that, said petition contained the names of 31,618 electors, and constituted a number equal to or in excess of 15 percent of the total number of votes cast for all candidates for Governor at the last preceding general election in the State of Arizona in 1944; that said Dan Garvey assigned said proposed constitutional amendment a number on the ballots to be voted at the general election on November 5, 1946, to-wit: No. 106 — YES, No. 107 — NO, and formulated a ballot title for said amendment; and thereupon, within the time prescribed by law certified said proposed amendment, ballot title and numbers, to the Clerks of the Boards of Supervisors of the several counties of Arizona, for printing on the ballots to be used at said general election on November 5, 1946; that said proposed amendment, ballot title and numbers were printed on the ballots used at the general election on November 5, 1946; that the total registered voters eligible to vote were 197,808; the vote cast at said election was 125,987 voting on said amendment was 111,432; voting for said amendment was 61,875; voting against said amendment was 49,557; said vote was canvassed on the 25th day of November 1946, by the Hon. Sidney P. Osborn, Governor of Arizona, the Hon. R. C.

Stanford, Chief Justice of the Supreme Court, and the Hon. Dan Garvey, Secretary of State of the State of Arizona, as provided by Section 13, Part 1, Article IV and Article XXI, Constitution of Arizona; and on the 25th day of November, 1946, the Hon. Sidney P. Osborn, Governor of Arizona, pursuant to the provisions of Section 5, Part 1, Article IV and Article XXI, Constitution of Arizona, issued his proclamation, declaring said amendment to be adopted and declared that it then became law, and a part of the Constitution of Arizona, as provided by Section 5, Part 1, Article IV; and Article XXI of the said Constitution; said amendment is commonly known as "The Right To Work Amendment," "The Right To Starve Amendment," and "Anti-Closed Shop Amendment"; at all times herein it is referred to and described as the "Anti-Closed Shop Amendment." That the text of said amendment is as follows, to-wit: "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the State or any subdivision thereof, or any corporation, individual or association of any kind enter into an agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization."

31. The plaintiffs herein further assert

that, although the aforesaid constitutional amendment purports and is intended to outlaw existing and future closed-shop, union-shop, or union-security agreements, nevertheless the said amendment is not operative and cannot be applied against said plaintiffs, or other parties to union-shop, closed-shop, or union-security agreements, or desiring to enter into said union-shop, closed-shop, or union-security agreements, for the reason that said constitutional amendment is not self-executing and requires enabling legislation to be enacted by the Legislature of Arizona before it can become operative.

VI.

THE CONTROVERSIES HEREIN

32. Following the effective date of said anti-closed-shop amendment, the defendant John L. Sullivan, Attorney General of the State of Arizona, officially and publicly stated that:

> The so-called 'right to work amendment' at all times subsequent to the 25th day of November, 1946, is the law of our State and has been made such by the constitutional amendment adopted by the popular vote of the people of the State of Arizona approving the same. That he as the

duly elected, qualified, and acting Attorney General of the State of Arizona has taken oath to enforce the constitution of the State of Arizona including the so-called 'right to work amendment'; that in the light of the foregoing it is his duty as Attorney General to enforce this amendment, and the duty of the citizens of Arizona, good and bad, Union, and non-union, employer and employee, to recognize, conform to and obey the law of the amendment. And that if there is any attempt on the part of any person or persons in the State of Arizona to violate said amendment, or to conspire to violate said amendment, it is his duty to exercise all the power vested in his office, civil, criminal, or equitable to enforce the provisions of said amendment and to prosecute actions for the violation thereof, and that he proposes to do so in all cases brought to his attention, and will require action to be taken for the enforcement of said law by the County Attorney of the County, or Counties, wherein violations occur.

33. The said defendant Attorney General at all times since the effective date of said anti-closed-shop amendment has asserted and now asserts that such amendment is self-executing, does not require enabling legislation, and is enforceable through either civil or

criminal proceedings brought by such defendant on behalf of the State, the available civil remedies being (1) suits in equity to enjoin violations or attempted violations, (2) suits at law to recover damages on behalf of aggrieved persons, and (3) suits at law by way of quo warranto or otherwise to revoke corporate charters or licenses of corporations to do business within the State when such corporations have violated said amendment, and the available criminal remedy being a proceeding under criminal code Section 43-1101, A.C.A. 1939, against employers and unions or union officers who conspire together to violate said amendment.

34. On various occasions following the effective date of said anti-closed-shop amendment, the said defendant Attorney General has threatened and continues to threaten to institute civil or criminal proceedings as aforesaid against any and all persons violating or attempting to violate or conspiring to violate said anti-closed-shop amendment, including specifically against all of the plaintiffs herein and the defendants American Sash & Door Company and D. A. Brewer.

35. On January 20, 1947, defendant W. B. Stevens in writing refused to pay his monthly dues as required by the rules and laws of plaintiff Local Union No. 2093, al-

though said plaintiff was at all times willing to receive such dues and to retain said defendant as a member of said plaintiff Local Union. Thereafter, on January 20, 1947, said defendant W. B. Stevens, by reason of such default in payment of dues, lost his status as a member in good standing of Local Union No. 2093 under the laws of that organization. Thereafter, on February 7, 1947, said plaintiff Local Union No. 2093, in compliance with the terms of the agreement mentioned in Paragraph No. 25, *supra*, gave due notice to the defendant American Sash & Door Co. that the said defendant W. B. Stevens had not retained his membership in said Local Union No. 2093, and requested that said defendant W. B. Stevens be discharged pursuant to the terms of said agreement. Notwithstanding the provisions of said agreement requiring it to discharge such defendant under the foregoing circumstances, the said defendant American Sash & Door Co. refused to discharge said defendant W. B. Stevens and predicated such refusal upon the following grounds: (1) the threats of the defendant Attorney General, as set forth in Paragraphs Nos. 32, 33 and 34 herein, and (2) threats by the defendant W. B. Stevens to institute and prosecute actions against said defendant American Sash & Door Co. for equitable relief and for whatever damages may be caused him by the enforcement of said agreement,

said defendant W. B. Stevens claiming a right under the laws of Arizona to institute such proceedings. In addition, the said defendant has stated that it will not, under any circumstances while the said amendment is in effect, renew or discuss renewal of the said agreement upon its expiration. In addition, numerous other employers throughout the State of Arizona, situated similarly to employer American Sash & Door Co., have threatened to refuse to observe or comply with existing union-security agreements for the same reasons as asserted by said defendant, and such employers have likewise refused, or threatened to refuse, to renew or discuss renewal of existing union-security agreements upon their expiration if the amendment is operative.

36. For more than three months prior to December 1, 1946, the defendant Edward L. Beard refused to pay his monthly dues as required by the rules and laws of plaintiff Phoenix Building and Construction Trades Council, although said plaintiff was at all times willing to receive such dues and to retain said defendant as a member of said Phoenix Building and Construction Trades Council. Thereafter, on December 1, 1946, said defendant Edward L. Beard, by reason of such default in payment of dues, lost his status as a member in good standing of Phoe-

nix Building and Construction Trades Council under the laws of that organization. Thereafter on February 7, 1947, said plaintiff Phoenix Building and Construction Trades Council, in compliance with the terms of the agreement mentioned in Paragraph No. 26, *supra*, gave due notice to the defendant D. A. Brewer that the said defendant Edward L. Beard had not retained his membership in said plaintiff Phoenix Building and Construction Trades Council, and requested that said defendant Edward L. Beard be discharged pursuant to the terms of said agreement. Notwithstanding the provisions of said agreement requiring it to discharge such defendant under the foregoing circumstances, the said defendant D. A. Brewer refused to discharge said defendant Edward L. Beard and predicated such refusal upon the following grounds: (1) the threats of the defendant Attorney General, as set forth in Paragraphs Nos. 32, 33 and 34 herein, and (2) the threats by the defendant Edward L. Beard to institute and prosecute actions against said defendant D. A. Brewer for equitable relief and for whatever damages may be caused him by the enforcement of said agreement, said defendant Edward L. Beard claiming a right under the laws of Arizona to institute such proceedings.

37. On January 16, 1947, defendant

James R. Miller refused in writing to pay his monthly dues as required by the rules and laws of plaintiff Local Union No. 2093, although said plaintiff was at all times willing to receive such dues and to retain said defendant as a member of said plaintiff Local Union. Thereafter, on January 16, 1947, said defendant James R. Miller, by reason of such default in payment of dues, lost his status as a member in good standing of Local Union No. 2093 under the laws of that organization. Thereafter, on February 7, 1947, said plaintiff Local Union No. 2093, in compliance with the terms of the agreement mentioned in Paragraph No. 27, *supra*, gave due notice to the plaintiff Ralph Henley Millwork that the said defendant James R. Miller had not retained his membership in said plaintiff Local Union No. 2093, and requested that said defendant James R. Miller be discharged pursuant to the terms of said agreement. Notwithstanding the provisions of said agreement requiring it to discharge such defendant under the foregoing circumstances, the said plaintiff Ralph Henley Millwork refused to discharge said defendant James R. Miller and predicated such refusal upon the following grounds: (1) the threats of the defendant Attorney General, as set forth in Paragraphs Nos. 32, 33 and 34 herein, and (2) the threats by the defendant James R. Miller to institute and prosecute actions

against said plaintiff Ralph Henley Millwork for equitable relief and for whatever damages may be caused him by the enforcement of said agreement, said defendant James R. Miller claiming a right under the laws of Arizona to institute such proceedings.

VII.

UNCONSTITUTIONALITY OF AMENDMENT

38. Plaintiffs herein and others similarly situated believe and assert that the said purported law hereinabove referred to and known as the "Anti-Closed-Shop Amendment" is void, unenforceable, unconstitutional and of no legal effect whatsoever for the following reasons, to-wit:

(1) Said alleged law prevents individuals and members of labor organizations, including the individual plaintiff union members herein and the other individual members of the plaintiff labor organizations herein, from accomplishing the ultimate purpose and objective of such individuals in assembling and associating together into labor organizations and in exercising the rights of speech, press and petition while so assembled, or as a part of such assemblage, and thereby denies, impairs and previously restrains the exercise by

such individuals and organizations of their rights of assembly, speech, press and petition, established under Sections 1, 2, 3, 4, 5, 6, 9, 13, 17, 25, of Article II, Constitution of Arizona, and guaranteed under the First Amendment to the United States Constitution as protected against invasion by the State by the Fourteenth Amendment. Enforcement of the said law will deprive the plaintiffs of the benefits and privileges of mutual association and assembly and of the mutual contracts and obligations heretofore assumed by members of the plaintiff organizations in such mutual association and assembly established under the aforementioned Sections of Article II, Constitution of Arizona: and as guaranteed by such First and Fourteenth Amendments, and would impair and restrain the exercise of rights alleged in Paragraphs Nos. 10 through 12, *supra*, all in violation of the said First Amendment as protected by the Fourteenth Amendment and Section 5, Article II, Constitution of Arizona.

(2) Said alleged law impairs and invalidates any provision in any collective bargaining agreement between any employer and any labor organization which provides that membership in such labor organization shall be a condition of employment, and, in particular, invalidates and impairs the obligations of the existing contracts entered into by the

plaintiffs Local Union No. 2093 and Phoenix Building and Construction Trades Council both prior and subsequent to the time such amendment became effective, as hereinbefore specifically set forth, and further, said alleged law makes inoperative, ineffective, and invalid, and otherwise impairs the obligations and agreements mutually and voluntarily assumed by and among members of labor organizations, including plaintiff labor organizations and their members, as expressed in their constitutions and by-laws, and in particular as is expressed in the constitution and by-laws of the plaintiff United Brotherhood of Carpenters and Joiners of America hereinabove referred to, all in violation of Section 25, Article II, Constitution of Arizona; and of Article I, Section 10, of the Constitution of the United States providing that no State shall make laws impairing the obligations of contracts.

(3) Said alleged law prevents labor organizations and their members, including plaintiff labor organizations and their members and the individual plaintiff herein, from discussing, negotiating, bargaining for, and entering into or renewing mutually agreeable collective bargaining agreements containing union-shop or union-security provisions with employers engaged in either interstate or intrastate commerce, including such employers

who are parties to this case, and from using such union-shop or union-security agreements as a means of maintaining present valid and existing property rights, in seniority, apprenticeship, training, insurance, working rules, safety rules, etc., and in achieving security, protection and an equality of bargaining power. Such alleged law prevents such employers, including plaintiff Ralph Henley Millwork and defendant American Sash & Door Co., from discussing, negotiating, bargaining for or entering into mutually agreeable bargaining agreements, and thereby such law has withdrawn a very important and traditional subject matter of collective bargaining from the subject matters concerning which employers are under a duty to bargain under the National Labor Relations Act. Such law has and will in the future precipitate labor disputes and disturbances which have and will interrupt the free flow of, and otherwise affect, commerce between the States, all in conflict with the provisions of the National Labor Relations Act, Title 29, Sections 151 to 166, U. S. Code Annotated, and violative of the public policy and law of the United States with respect to employers or employees engaged in interstate commerce or engaged in occupations affecting interstate commerce as laid down in Section 151 of said Code. Such law is in conflict with and violates and seeks to abrogate rights and privi-

leges conferred on employees, members of labor organizations and labor organizations, including the individual plaintiffs in this case and the plaintiff labor organizations and ther members by Sections 157, 158 and 159 of said Code aforesaid, and it is in conflict with, violates, and seeks to abrograte duties and obligations imposed upon employers, including the employers involved in this case, under such National Labor Relations Act, particularly Section 158 thereof, all in violation of Article VI of the United States Constitution, and Section 3, Article 2, Constitution of Arizona, providing that the laws of the United States shall be the supreme law of the land.

(4) The said law prevents labor organizations and employers, including the plaintiff labor organizations and the employers in this case, from negotiating, entering into and renewing mutually agreeable collective bargaining agreements containing union-shop or union-security provisions, or requiring employees to become and remain members of labor organizations as a condition of employment, and thereby deprive such labor organizations and their members and employers, including the plaintiff labor organizations, plaintiff employer and plaintiff individual union members herein as representative of a class, of property rights and liberties secured, protected and guaranteed against infringe-

ment by Sections 1, 2, 3, 5, 6, 9, 13, 17, 25, of Article II, Constitution of Arizona and by the Fourteenth Amendment to the United States Constitution, and in particular of the right and liberty freely to contract protected as a property right under Section 25, Article II, Constitution of Arizona, and under the due process clause of the Fourteenth Amendment to the United States Constitution. The said alleged law denying plaintiff labor organizations and plaintiff employer and the individual plaintiff of liberties and of civil and property rights, as heretofore set forth, is arbitrary and unreasonable and constitutes an improper and unlawful exercise by the State of Arizona of its police power. Said law is without rational basis, is not justified by existing circumstances, and is not in the public interest. That there was and is no clear and present danger, or substantive evil to the people of Arizona, her institutions, or the individual liberties of its residents within the rule of reason, to warrant or justify the indiscriminate outlawing of the union-shop, closed-shop, or union-security contracts, either those presently existing or the negotiation of such contracts in the future, or the discrimination against union employers and union workers in favor of non-union employers and employees. Historically, in the years 1917 to 1921, inclusive, there were very few persons working under closed-shop or union-

shop conditions in the State, and as a consequence there occurred repeated strikes, accompanied by death, violence, destruction of property, unlawful deportation of more than one thousand men from their homes into desert areas of sister States; jails and courts were filled with strikers or their assailants; soldiers patrolled the streets of many Arizona cities; armed citizens representing opposing economic beliefs faced each other; the Legislature was called upon to pass, and it did pass, anti-sabotage, anti-syndicalism; anti-Red-Flag bills, and measures of like import; in a word industrial anarchy prevailed. In the years following 1921, the use of union-security agreements became more and more prevalent, and as a consequence industrial peace prevailed throughout the State; during the years 1941 to 1946, inclusive, no strikes occurred in any war industry during the war; no violence of any significance in connection with a labor dispute occurred in any industry during said years, or until after the enactment of said amendment. The said law imposes hardships in disproportion to any possible public benefit; and the interests of the public generally are not such as to require or justify the enactment of said law. For the foregoing reasons the said law is in violation of Article II, Constitution of Arizona, and of the Fourteenth Amendment to the United States Constitution.

(5) The said alleged law, by prohibiting agreements between labor organizations and employers which contain union-shop or union-security provisions, discriminates solely against the class of members of labor organizations, and in particular against plaintiff labor organizations and their members and and the individual plaintiff herein on the one hand and in favor solely of non-members of labor organizations and of the individual employee defendants herein on the other. Such alleged law constitutes class legislation passed in the interest solely of the class of non-union employees and not in the interest of the public generally. The said law is further discriminatory in that it prohibits labor organizations alone out of all other classes of organizations, societies, or voluntary associations established for the purpose of bringing cultural, social, economic or spiritual benefits to their members, from attempting by voluntary arrangement to require all who obtain the benefits of union activity to contribute to the support and maintenance of that union, and this in spite of the fact that such unions are required, under federal law in respect to interstate industries, to distribute benefits achieved through the process of collective bargaining equally to all employees within the bargaining unit and to represent all within such unit on the same basis regardless of whether such employees are or are not union

members. Accordingly, such alleged law is in violation of the provisions of Section 13, Article II, Constitution of Arizona, and the provisions of the Fourteenth Amendment to the United States Constitution requiring that no State shall deny any person within its jurisdiction the equal protection of the laws.

(6) Plaintiff employer alleges that the said alleged law is unconstitutional, void and unenforceable for the reasons heretofore set forth and for the following additional reasons: It denies such plaintiff employer the right to employ workmen upon such terms as may be agreed to between the employer and the employees either acting individually or through their duly selected collective bargaining agencies where an equality of bargaining power has been established. The right of an employer to hire or deny employment to any person without arbitrary interference by law is an inherent, basic and fundamental right guaranteed to employers by the various constitutional provisions heretofore referred to in the Federal and State Constitutions. Such right is incident to the freedom of the individual and as such is a privilege and right which may not be arbitrarily interfered with. The said anti-closed-shop amendment unlawfully and arbitrarily deprives said plaintiff employers of property rights incident to and

inherent in their collective bargaining agreements as heretofore alleged.

VIII.

GROUNDS FOR EQUITABLE AND DECLARATORY RELIEF

39. Failure by employer plaintiff and defendants and others similarly situated to observe agreements because of the said "Anti-Closed-Shop Amendment" and enforcement of such amendment against such plaintiffs and others similarly situated, as threatened by the defendant Attorney General, has and will deprive the plaintiff labor organizations, the individual plaintiff employee as representative of a class, and others similarly situated, of the benefits, advantages and privileges of mutual association and assembly and of the mutual obligations heretofore assumed by members of such plaintiff organizations in such mutual association and assembly. Such acts have and will deprive such plaintiff labor organizations, the individual plaintiff as representative of a class and all the members of such plaintiffs of the benefits, rights, privileges and immunities heretofore received and now possessed under contracts made by and with plaintiff labor organizations and by and among members thereof, and have and will prevent such plaintiffs and all members

of such plaintiffs, from engaging in all of the activities hereinbefore set forth and from securing the benefits, objectives and purposes of their mutual association and assembly as hereinabove set forth, and have and will irreparably injure and eventually destroy the plaintiff labor organizations. The acts of said defendants as performed, threatened and intended aforesaid will interfere with and prevent and cause a cessation and denial of collective bargaining relations between the plaintiff labor organizations and employers and all others in the State of Arizona similarly situated, and has and will interfere with and prevent the renewal and continuance of contracts and agreements now in effect between the said plaintiffs and employers and others, including contracts which by their terms provide for automatic renewal. Such acts will cause plaintiff labor organizations and others similarly situated to lose present and prospective members and to lose considerable finances because of an inevitable decrease in amount of dues collected, will imperil the security of such labor organizations and their members, including the individual plaintiff as representative of a class, and will prevent plaintiff labor organizations and the individual plaintiff employee as representative of a class, and others similarly situated from enjoying the benefits of the National Labor Relations Act and from achieving an

equality of bargaining power. Such acts will imperil and destroy the entire process of collective bargaining in the State of Arizona and will inevitably interfere with and disrupt both interstate and intrastate commerce in wide areas of the State. Such acts have and will imperil and disrupt harmonious relationships existing between plaintiff labor organizations and others similarly situated and employers, all to the irreparable injury of plaintiff labor organizations, their members, and the individual plaintiff employee as representative of a class, and others similarly situated and of plaintiff employer, and to the great prejudice of the general public. Furthermore, enforcement of the amendment by the Attorney General and by individuals situated similarly to defendants Stevens, Beard and Miller will result in a great multiplicity of suits. All of the foregoing will cause irreparable damage to plaintiffs, and such damages will ensue unless the defendant Attorney General is restrained as hereinafter prayed.

40. By reason of the said amendment there has arisen a grave question concerning the rights, status and legal relations of the parties to the existing agreements hereinbefore set forth and as to the right of plaintiffs and others similarly situated to enter into or renew agreements containing union-shop, closed-shop, or union-security provisions; that

the rights, status, duties and obligations of the parties to said existing agreements have been made uncertain and insecure by reason of said amendment and by the position taken by the defendant employers, individual defendants, and defendant Attorney General thereunder; that it is necessary to obtain an adjudication from this Court setting forth the rights, status, duties and obligations of such parties in respect to such agreements and in respect to future agreements in order to avoid widespread confusion, disruption of employment, Veteran's Housing, public and private projects, and the production and sale of the products of Arizona in interstate commerce, and interference with existing rights; that there exists an actual controversy between the parties to the existing agreement as herein alleged and between the plaintiff labor organizations and employers and the Attorney General of the State and the individual defendants and defendant employers, as to the meaning, construction, application, operation, legality and constitutionality of the said Anti-Closed-Shop Amendment.

41. The plaintiffs and defendants are joined in this action under the provisions of Sec. 21-512 A.C.A. 1939, for the reason that rights are asserted for relief arising out of a series of transactions under which a ques-

tion of law common to all of them arises in the action.

42. This cause involves matters of great public interest, and issues which should promptly be decided to avoid industrial conflict, work stoppages on veteran's housing, and other public and private construction projects, and in other industry; and to avoid hardship and losses to the public as well as to the parties. Pursuant to the provisions of Sec. 21-1217 A.C.A. the cause should be advanced on the calendar in order that a speedy hearing and determination may be had.

WHEREFORE, PLAINTIFFS RESPECTFULLY PRAY:

1. For judgment pursuant to the Arizona Declaratory Judgment Act, (Article 7, Chapter 27, A.C.A. 1939), declaring the rights, status and other legal relations of the plaintiffs and others similarly situated under the said "Anti-Closed-Shop Amendment," and declaring that said Amendment is void, unconstitutional and unenforceable, and is in violation of the Constitution of the State of Arizona and the Federal Constitution as hereinbefore specifically and especially asserted, and in addition specifically declaring:

(a) that as regards the existing agreement in respect to union security between the defendant American Sash and Door Company, a corporation, and the plaintiff labor organization as hereinbefore specified, said agreement is legal, valid and enforceable between the parties thereto notwithstanding the said Anti-Closed-Shop Amendment or "Right to Work Amendment"; that defendant W. B. Stevens, and others similarly situated may be duly discharged solely for failure to maintain union membership pursuant to said agreement and have no cause of action against either the defendant employer or plaintiff labor organization parties thereto; that the parties plaintiff have a constitutional and lawful right, notwithstanding the provisions of said Anti-Closed-Shop Amendment or "Right to Work Amendment" to continue, extend, or renew said agreement at its expiration date if they so desire;

(b) that as regards the existing agreement in respect to union security between defendant D. A. Brewer, an individual, and the various plaintiff labor organizations as hereinbefore specified, said agreement is legal, valid, and enforceable between the parties thereto notwithstanding the Anti-Closed-Shop or "Right to Work Amendment"; that defendant D. A. Brewer may

duly discharge Edward L. Beard, and others similarly situated, solely for failure to maintain union membership pursuant to said agreement; that said Edward L. Beard, and others similarly situated have no cause of action against either the defendant employer or plaintiff Labor organizations parties thereto; that the parties have a Constitutional and lawful right notwithstanding the provisions of said Anti-Closed-Shop or "Right to Work Amendment" to continue, extend or renew said agreement at its expiration date, if they so desire;

(c) that as regards the existing agreement in respect to union security between the plaintiff Ralph Henley, doing business as Ralph Henley Millwork and the plaintiff organization as hereinbefore specified, said agreement is legal, valid, and enforceable between the parties thereto notwithstanding that it was entered into subsequent to the effective date of the said Anti-Closed-Shop or "Right to Work Amendment"; that defendant James R. Miller, and others similarly situated, may be duly discharged for failure to maintain union membership pursuant to said agreement and have no cause of action against either the employer or plaintiff labor organizations parties thereto; that the parties plaintiff have a

Constitutional and lawful right notwithstanding the provisions of said Anti-Closed-Shop or "Right to Work Amendment" to continue, extend, or renew such agreement at its expiration date if they so desire;

(d) that as regards the existing agreements between the Arizona State Federation of Labor, as an employer in relation to the publication of its newspaper Arizona Labor Journal, and the plaintiff labor organizations as hereinbefore specified affiliated with said plaintiff Arizona State Federation, that it may maintain and operate said paper on a Union shop, Closed shop, basis as long as it shall be published, said agreements are valid and enforceable between the parties thereto notwithstanding the Anti-Closed shop or "Right to Work Amendment"; that no proceedings may be lawfully instituted or prosecuted by John L. Sullivan, as Attorney General of Arizona, or by any public prosecutor or law enforcement officer under his general supervision, either civil, criminal, or equitable to require the said plaintiff Arizona State Federation of Labor to conform to the provisions of the aforesaid amendment either to employ or to maintain in employment any person or persons who is not in good stand-

ing in the Union having jurisdiction over the work to be performed.

2. That the Court shall issue an injunction, upon the entry of judgment for plaintiffs, against the defendant John L. Sullivan individually and in his official capacity, and against all other parties represented as a class by said defendant, being the local prosecuting officials of all the counties of the State of Arizona and all other officials of Arizona who would have authority to take any action towards the enforcement of said law, and that such persons and defendants be enjoined and restrained from taking any steps whatsoever in court or out of court looking to the enforcement of the provisions of said law and specifically from bringing or continuing any prosecutions for alleged violations of said law by reason of any person, including plaintiffs and defendants American Sash & Door Company, and D. A. Brewer and others similarly situated herein, continuing to observe provisions of existing collective bargaining agreements in respect to union security or requiring membership in a labor organization as a condition of employment or because of entering into any such collective bargaining agreements containing such provisions and from in any way interfering with the activities of the plaintiffs and the

class represented by them by reason of any of the provisions of said law.

3. For such other and further equitable relief as the plaintiffs may show themselves entitled to have, and

4. For all costs in this proceeding.

(Signature of counsel for plaintiffs)

(Verified by A. E. Williams, Feb. 12, 1947)

(Exhibit A, in pamphlet form, enclosed in envelope inside back cover)

EXHIBIT 2

November 4, 1946

SUPPLEMENTAL AGREEMENT

1. It is hereby agreed that the following wage scale shall prevail, effective October 10, 1946.

Classification	Minimum Wage Per Hour
Cabinet Shop Layout	$1.50
Frame Dept. Layout	1.50
Stickerman	1.50

Benchman	1.50
Stock Cutter	1.25
Shaper and Bandsawyer	1.50
Door Layout	1.50
Bar Nailers	1.12
Chisel, Mortiser and Tenoner	1.18
Rip Saw, Planer and Jointer	1.18
Put Up Man	1.06
Frame Nailer	1.12
Sanders, Drum and Belt	1.12
Materialmen	1.01

Premium men shall receive an increase of 10c per hour.

2. It is hereby agreed that either party may reopen the agreement for negotiations for a new wage scale on and after July 1, 1947.

3. It is hereby agreed that in all other respects the agreement between the parties shall be and hereby is extended until January 7, 1948.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year at the head of this instrument.

District Council of Carpenters
Maricopa County and Vicinity
By J. H. McNEILL

United Brotherhood of Carpenters
and Joiners of America, Int. Union
By JOHN MURRAY

AMERICAN SASH & DOOR CO.
By E. PROCTOR.

Millmen, Cabinet Makers and Lumber
Handlers Union No. 2093.
By W. C. POOR

AGREEMENT

THIS AGREEMENT, made and entered into this the 4th day of November, 1946, by and between AMERICAN SASH & DOOR CO., hereinafter referred to as the Company, and the MILLMEN, CABINET AND LUMBER HANDLERS UNION NO. 2093, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor, hereinafter referred to as the Union, and the same is applicable to the planing mills of the Company located in Phoenix, Arizona, and vicinity.

It is understood that this agreement is intended as a Master Agreement and has been negotiated with the mill owners in the Association known as competitors, and that it is a true copy of their agreement made applicable to the above mentioned company.

I

Purpose of Agreement and Jurisdiction of Union

The general purpose of this agreement is, in the mutual interest of the Company and its employees, to provide for the operation of the planing mill hereinabove mentioned under conditions which will further to the fullest extent possible the safety of the employees, economy of operation, quality and quantity of output, elimination of waste, cleanliness of the plant, and protection of property. It is recognized by the parties to this agreement that it is to their mutual advantage to co-operate fully, individually and collectively, for the advancement of said conditions.

The parties hereto desire to establish the standards of hours of labor, wages, and other conditions under which the employees shall work for the Company during the term of this agreement and desire to regulate mutual relations between the parties hereto.

Local Union No. 2093 is a regularly constituted union with jurisdiction over all millmen cabinet makers, bench men, sash, door and screen men, as well as lumber clerks, checkers and handlers for the area comprising the City of Phoenix and vicinity, and whereas Local No. 2093 is affiliated with the Maricopa County Carpenters District Council, the Building Trades Council, and the Central Labor Council of Phoenix, it hereby undertakes and binds its members to the policy of adjudicating all wage scales and working conditions by the orderly processes of negotiations through its regularly constituted representatives.

II.

Recognition

The Company agrees to recognize and deal with the Union as the sole collective bargaining agent for all of their planing mill employees in their operations at Phoenix, Arizona, except office workers, shipping clerks, and superintendents, and the Company agrees to continue such recognition during the life of this agreement.

III

Employment

The Company agrees to have in their employ only members in good standing of the Union, subject, however, to the following terms and conditions:

1. The Company shall have the right to determine the competency of all persons to be hired. If after a request by a Company, the Union is unable to furnish a person satisfactory to the Company, the Company shall have the right to hire a non-union man, provided, however, that any non-union man so hired shall be subject to a probationary period of fifteen (15) days, and if after such period he is acceptable to the Company he shall become a member of the Union. If the Union is notified by a Company that a non-union man has been hired for the above-mentioned probationary period, the Union shall be obligated to issue a working card to such individual before he commences work, it being understood and agreed that the purpose of such working card is to enable the Union to maintain records of such probationary employment.

2. Employers agree that any employee who fails to maintain membership in the Union as provided in Section I above shall be discharged upon proper notice given by the Union.

3. The Company shall have the right to discharge any employee for misconduct, inefficiency, insubordination or incompetency.

4. The shop stewards shall make themselves known to the employer. No shop steward shall be discharged or laid off solely for the reason that he is a shop steward or that he is performing his duties as such.

IV.

Seniority Rights

In filling vacancies in the higer classifications, the Company accepts the principle of exercising due regard for length of service, taking into account ability and efficiency to perform the duties of the higher classification, and the general practice will be followed of promoting those who by length of service and ability to perform the duties of the higher classification shall be deemed to have earned promotion.

Any regular employee who is laid off because of a shut-down or lack of work shall be returned to work if a vacancy for his classification exists, at his regular status and if he is available within fifteen (15) days.

In the event of a layoff no new man shall

be hired until the list of laid off employees in their respective classifications is exhausted, providing that a laid off employee in such classification is available within fifteen (15) days. The Company reserves the right to employ men regardless of this provision when necessary to fill jobs for which qualified workers cannot be promptly obtained from the list of laid off employees or from the Union.

The Shop Steward shall head seniority list in case of layoffs in his classification.

V

Hours of Work

1. Eight (8) hours shall constitute a normal day's work and forty (40) hours shall constitute a regular work week. The regular work days shall consist of Monday, Tuesday, Wednesday, Thursday and Friday. Any work in excess of eight (8) hours in any twenty-four (24) hour period shall be considered overtime and be paid for at the rate of time and one-half. Any work in excess of forty (40) hours in any work week shall be considered overtime and shall be paid for at the rate of time and one-half if such overtime has not been previously paid for at such rate, as overtime in excess of the normal eight (8)

hour day. Any work done on Saturday or Sunday shall be paid for at rate of time and one-half.

2. Employees ordered to report for work shall receive a minimum of four (4) hours' pay at straight time. Any employee shall be considered as having been ordered to work if the foreman or working superintendent fails to notify him not to report at the end of the previous day or shift.

3. No employee shall be required to work more than five (5) consecutive hours without a meal period.

VI.

Holidays

The following days will be reserved as holidays and no work shall be done unless rate and one-half is paid: New Year's Day, Fourth of July, Labor Day, Armistice Day, or any one day designated as Armistice Day, Thanksgiving Day, and Christmas Day. When a holiday falls on Sunday the following day will be observed. No work will be done on Labor Day except to save life or property.

VII.

Wage Rates

There is attached hereto and made a part hereof a wage scale covering the various classifications of employment in the Company's planing mills, and no employee will be expected to perform work in the classifications listed for less than the prescribed scale. The Company agrees that there shall be only one apprentice for every four (4) journeymen in the planing mills covered by this agreement. The Company further agrees to give each and every apprentice a chance to learn the several branches of the trade and to advance their wages in conformity with the attached wage scale. An apprentice shall not be less than seventeen years of age and not more than twenty-four years of age when starting his apprenticeship. He shall undergo a course of training for four years. An apprentice shall not be used to operate a machine continuously taking the place of a journeyman and depriving the apprentice of the opportunity to complete his training on other operations. Apprentices shall not be required to work in the warehouse as regular employees of that department. They may assist in the warehouse as a part of their training or to avoid temporarily the necessity of laying them off. The parties agree to

meet and discuss an apprentice training program.

Any employee receiving wages in excess of scale for his classification at the time this agreement is executed shall be given a 10% increase.

VIII.

Vacations

During the year 1946, each employee who has been in the employ of the company for not less than one (1) year preceding the date of the commencement of his vacation and has worked at least 1200 straight time hours during the year shall be entitled to vacation of one week with forty (40) hours' pay at his regular rate. Each employee who has been in the employ of the Company for not less than five (5) years preceding the date of the commencement of his vacation and has worked at least 1200 hours in each of five (5) years shall be entitled to vacation of two (2) weeks with eighty hours' pay at his regular rate.

IX.

Sales of Products

It is understood and agreed by the Union

that the Company shall have and maintain the right of selling and delivering merchandise to any one to whom they desire, provided, however, that no Union man will be required to deliver through a picket line.

X.

Grievances, Arbitration, Strikes and Lockouts

It is agreed that all differences arising as to the interpretation or application of the terms of this agreement shall be discussed by the parties and every effort will be made to settle such differences in a spirit of amity and understanding. The general procedure shall be for the employee or employees who have a grievance to take up such grievance with the foreman of their department. The shop steward may take the grievance up for any employee when requested to do so. If no settlement can be reached in this manner, the matter shall then be referred to the business representative of the Union and the manager of the Company. If no settlement is reached after such meeting, then either party may request arbitration of the dispute. Request for arbitration shall be presented in writing to the other party and shall contain complete outline of the nature of the complaint. The matter in dispute shall then be referred to a

permanent arbiter for settlement within ten (10) days after receipt of the request for arbitration. The parties agree that Jerome M. Kelleher shall be designated as permanent arbiter. In the event that he is unable to serve, a substitute arbiter designated by the permanent arbiter, shall be accepted by the parties. The arbiter's fee shall be equally divided between the parties. Expenses of witnesses called by either party shall be paid by the party requesting the attendance of such witness. The expense of any witness called at the request of the arbiter shall be borne equally by the parties.

It is agreed that there shall be no strikes, lockouts or work stoppages of any nature during the tenure of this agreement except that this provision shall not be binding upon either party if the other party fails or refuses to abide by the arbitration procedure set forth herein.

XI.

Duration of Agreement

This contract shall remain in effect from date of signing until January 7, 1947, except that either party may re-open the agreement for negotiation of a new wage scale upon thirty (30) days' notice given to the other party on or after July 1, 1946.

Wage scales provided in the agreement shall become effective immediately and shall remain in effect for the duration of the contract unless changed by mutual agreement.

Company agrees to adjust compensation of all employees on their payrolls to conform with the new scale retroactive to November 2, 1945.

XII.

Union Label

It is hereby understood and agreed by both the Company and the Union that the said union label herein mentioned and referred to is, and shall remain the property of the United Brotherhood of Carpenters and Joiners of America and be at all times in the possession of a member of the United Brotherhood of Carpenters and Joiners of America; and that said label shall at no time be used in any manner that will be detrimental to the interests and welfare of the members of the said United Brotherhood of Carpenters and Joiners of America; and that upon evidence that the said label is being used in a manner detrimental and harmful to the members of the said United Brotherhood of Carpenters and Joiners of America, then the use of said label shall be immediately withdrawn from

the planing mill of the Company violating this section of the Agreement.

By executing this agreement the parties agree that they have settled and compromised all of their differences and disputes with respect to wages, hours and working conditions prior to the date of this agreement and that the parties shall be bound by the terms hereof for the period set forth herein, and that this is the entire agreement between the parties.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year in this instrument first above written.

District Council of Carpenters
Maricopa County and Vicinity
By J. H. McNEILL

United Brotherhood of Carpenters
and Joiners of America, Int. Union
By JOHN MURRAY

AMERICAN SASH & DOOR CO.
By E. PROCTOR

Millmen, Cabinet Makers and
Lumber Handlers Union No. 209
By W. C. POOR

(Title of Court and Cause)

MOTION TO STRIKE

Filed: Mar. 15, 1947

COMES NOW the defendant, John L. Sullivan, individually and as Attorney General of the State of Arizona and without waiving any other motions and pleadings filed herein makes the following motion to strike:

I.

Moves to strike the complaint filed herein and the whole thereof for the following reasons:

1. That said complaint is violative of and fails to comply with the provisions of Sections 21-404 and 21-408, A.C.A. 1939.

2. That all of the allegations of said complaint are redundant, immaterial, impertinent and scandalous.

3. That plaintiffs, American Federation of Labor; Arizona State Federation of Labor; Phoenix Building and Construction Trades Council; United Brotherhood of Carpenters and Joiners of America; Millmen, Cabinet Makers and Lumber Handlers Union No.

2093, are alleged to be voluntary unincorporated associations and as such are not legal entities having a capacity to sue and therefore all allegations as to their existence, functions, powers, duties, members, contracts, agreements, aims, objectives and other matters concerning said associations are immaterial and irrelevant.

4. That said complaint is so replete and overburdened with immaterial allegations as to the policy, philosophy and ideology of labor unions that it is impossible to formulate any clear cut issue of fact or law based thereon.

5. That said complaint although purporting to contain only one claim for relief actually contains several such claims for relief which are so involved and intermingled that it is impossible to separate the same.

II.

Moves to strike those specific portions of said complaint hereinafter designated for the reasons hereafter specified:-

1. Paragraph I of said complaint and the whole thereof for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

Sub-paragraphs 1 to 6, inclusive, and sub-paragraphs 8 to 16 inclusive, of Paragraph II of said complaint and the whole of said sub-paragraphs for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraphs violate the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

(c) That plaintiffs, American Federation of Labor, Arizona State Federation of Labor, Phoenix Building and Construction Trades Council, United Brotherhood of Carpenters and Joiners of America, Millmen, Cabinet Makers and Lumber Handlers, Union No. 2093, are alleged to be voluntary unincorporated associations and as such are not legal entities having a capacity to sue and therefore all allegations as to their existence, functions, powers, duties, members, contracts, agreements, aims, objectives and other matters concerning said associations are immaterial and irrelevant.

3. That portion of sub-paragraph 7 of

Paragraph II of said complaint beginning with the words "and a member of local union No. 2093" and ending with the words "State of Arizona" for the following reasons:

(a) Said allegations are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

(c) Said union, brotherhood and federations are alleged to be voluntary unincorporated associations and any allegations as to plaintiff, Forest L. Stiers, being a member thereof are immaterial.

4. That portion of sub-paragraph 17 of Paragraph II of said complaint which constitutes the last sentence thereof for the following reasons.

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

5. All of sub-paragraph 18 of Paragraph

II of said complaint and the whole thereof for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

(c) Said sub-paragraph 18 violates the provisions of Section 21-524, A.C.A. 1939.

6. That portion of sub-paragraph 19 of Paragraph III of said complaint beginning with the words "where it employs" and ending with the word "commerce" for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

7. That portion of sub-paragraph 20 of Paragraph III of said complaint beginning with the words "and was and is engaged in concrete construction work" and ending with the word "commerce" for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

8. That portion of sub-paragraph 21 of Paragraph III of said complaint beginning with the words "and prior" and ending with "No. 2093" for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A. C. A. 1939.

9. That portion of sub-paragraph 22 of Paragraph III of said complaint reading "and prior to December 1, 1946, was a member in good standing of plaintiff Phoenix Building and Construction Trades Council" for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A. C. A. 1939.

10. That portion of sub-paragraph 23 of Paragraph III of said complaint reading as follows: "and prior to January 1, 1947, was a member in good standing of plaintiff, Local Union No. 2093" for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

11. All of sub-paragraph 23 (a) of Paragraph III of said complaint and the whole thereof for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

12. That portion of sub-paragraph 24 of Paragraph III of said complaint beginning with the words "and is authorized" and ending with the words "enforce the laws of the state" being the end of said sub-paragraph for the following reasons:

(a) All of the allegations of said

paragraph are redundant and immaterial.

(b) Said allegations fail to comply with the provisions of Section 21-404, Section 21-408 and Section 21-524, A.C.A. 1939.

13. All of Paragraph IV of said complaint including sub-paragraphs 25 through 29, inclusive, for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

14. That portion of sub-paragraph 30 of Paragraph V of said complaint reading as follows: "said amendment is commonly known as 'THE RIGHT TO WORK AMENDMENT,' 'RIGHT TO STARVE,' and 'CLOSED SHOP AMENDMENT' for the following reasons:

(a) Said allegation is redundant, immaterial and scandalous.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

15. All of sub-paragraph 31 of Paragraph V of said complaint and all of sub-paragraphs 33, 35, 36 and 37 of Paragraph VI of said complaint for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

16. Those portions of Part (1) of sub-paragraph 38 of Paragraph VIII of said complaint as follows: Beginning with the word "end" at the end of the first line of said sub-paragraph and ending with the words "plaintiff labor organizations herein" in Line 4 of said sub-paragraph.

The words "and organizations" appearing at the end of Line 10 of said sub-paragraph.

The words "and of the mutual contracts and obligations heretofore assumed by members of the plaintiff organizations in such mutual association and assembly" in Lines 18 to 20 of said sub-paragraph.

The words "and would impair and restrain the association of rights alleged in paragraphs nos. 10 through 12, *supra*" ap-

pearing in Lines 23 and 24 of said sub-paragraph. Said allegations should be stricken for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

17. All of Parts (2 through 6) inclusive, of sub-paragraph 38 of Paragraph VII of said complaint for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

18. Those portions of sub-paragraph 39 of Paragraph VIII of said complaint as follows: The words "the plaintiff labor organizations" in Line 6 of said sub-paragraph.

Beginning with the words "and of" at the end of Line 9 and ending with the word "assembly" being the first word in Line 12 of said sub-paragraph.

The words "such plaintiff labor organizations" in Lines 12 and 13 of said sub-paragraph.

Beginning with the words "under contracts" in Line 16 of said sub-paragraph and ending with the words "automatic renewal" in Lines 14 and 15 on Page 34 of said complaint.

Beginning with the words "plaintiff labor organizations" in Lines 15 and 16 on Page 34 of said complaint and ending with the words "organizations and" in Lines 21 and 22 on Page 34 of said complaint.

Beginning with the words "Such acts and" in Line 25 on Page 34 of said complaint and ending with the end of said paragraph 39.

All of said sub-paragraph 39 of Paragraph VIII of said complaint.

Said allegations should be stricken for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the pro-

visions of Section 21-404, and Section 21-408, A.C.A. 1939.

19. All of sub-paragraph 40 of Paragraph VIII of said complaint for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

20. All of sub-paragraph 42 of Paragraph VIII of said complaint for the following reasons:

(a) All of the allegations of said sub-paragraph 42 are redundant, immaterial and scandalous.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

21. Exhibits (a) and 2 attached to said complaint for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

22. Those portions of the caption of said complaint which read as follows: "AMERICAN FEDERATION OF LABOR: ARIZONA STATE FEDERATION OF LABOR: PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL: UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; MILLMEN, CABINET MAKERS AND LUMBER HANDLERS, UNION NO. 2093:" and "and as President of LOCAL UNION NO. 2093" for the following reasons:

(a) All of the allegations of said paragraph are redundant and immaterial.

(b) Said paragraph violates the provisions of Section 21-404 and Section 21-408, A.C.A. 1939.

(Signature of counsel for defendants)

Identical Motions to Strike were filed by defendants other than the Attorney General, and are omitted from this Abstract to avoid duplication.

(Title of Court and Cause)

MOTION TO DISMISS

Filed: Mar. 15, 1947

COMES NOW the defendant, John L. Sullivan, individually, and as Attorney General of the State of Arizona and without waiving any other motion filed herein moves to dismiss the complaint in the above-entitled action for the reasons:

I.

The court lacks jurisdiction over the persons of plaintiffs, American Federation of Labor, Arizona State Federation of Labor, Phoenix Building and Construction Trades Council, United Brotherhood of Carpenters and Joiners of America, Millmen, Cabinet Makers and Lumber Handlers Union No. 2093 and Forest L. Stiers, as President of Local Union No. 2093.

II.

The complaint fails to state a claim upon which relief can be granted.

(Signature of counsel for defendants)

(Title of Court and Cause)

MOTION TO DISMISS

Filed: Mar. 15, 1947

Come now American Sash & Door Company, a corporation, and W. B. Stevens, defendants herein, and move the court:

That it dismiss this action as between them and American Federation of Labor; Arizona State Federation of Labor; Phoenix Building and Construction Trades Council; United Brotherhood of Carpenters and Joiners of America; Millmen, Cabinet Makers and Lumber Handlers Union No. 2093 and Forest L. Stiers, as President of Local Union No. 2093, for the following reasons:

1. That all of the plaintiffs just above named, except Forest L. Stiers as President of Local Union No. 2093, are voluntary and unincorporated associations, as appears from the allegations of the complaint, and have no right or power under the law to institute or maintain this action.

2. That the plaintiff, F. L. Stiers, has no right under the law to institute or maintain this action as President of said Local Union No. 2093.

(Signature of counsel for defendants)

Identical Motion to Dismiss was filed by D. A. Brewer and Edward L. Beard, and is omitted to avoid duplication.

(Title of Court and Cause)

MOTION TO DISMISS

Filed: April 5, 1947

Come now AMERICAN SASH & DOOR COMPANY, a Corporation, and W. B. STEVENS, Defendant herein, and without waiving any other motions on file herein, move to dismiss the complaint in the above entitled action, for the following reasons:

I.

That it appears from the face of the complaint that the several causes of action attempted to be stated therein have been improperly joined, in that said several alleged causes of action arise out of separate, distinct and unrelated agreements, and that the parties signatory have no rights in any agreement except the particular agreement which they executed.

II.

The complaint fails to state a claim upon which relief can be granted.

(Signature of counsel for defendant)

MEMORANDUM OF OPINION AND ORDER.

Filed: May 19, 1947

This matter is presented on motions to strike and to dismiss. All defendants have filed motions to dismiss upon the ground that the plaintiffs are voluntary unincorporated associations and are not legal entities and have not legal capacity to sue.

It is unquestionably true that both at common law and in the various States of the Union such associations have been held to not be legal entities and therefore incapable of sueing or being sued except where they have been invested with such power by statute, either expressly or by necessary implication.

The Legislature of this State has never expressly recognized an association such as

a labor union as a legal entity with right to sue or be sued; that is, it has never expressly given it the right to sue or be sued, or declared it to be a legal entity.

The Legislature has, however, enacted a number of laws which do recognize voluntary associations, and in some statutes expressly recognize the existence of labor organizations having rights entitled to protection under the law.

First: Section 1-103 defines a person to include an association.

Second: Section 56-204 provides that wages on public works in this State shall conform with prevailing wages of each type of workmen doing similar work affiliated with or belonging to the American Federation of Labor, the Arizona State Federation of Labor, or any other State or National labor organization.

Third: Section 27-309 provides for the validity of a clause for arbitration of any controversy where the contract provides for it, except that it should not apply to collective contracts between employer and employees or employer and association of employees.

Fourth: Sections 43-5604 and 5605

authorize labor unions to adopt a label and provide for its registration with the Secretary of State, and also provide that any person who may use the name or seal of such a union in and about the sale of goods without authority from such union shall be guilty of a misdemeanor.

Fifth: Section 43-1608 provides that it shall be a misdemeanor for any person to coerce or compel any other person to enter into either a verbal or written agreement not to join or become a member of a labor organization as a condition of such person securing employment or continuing in the employment in which he was then engaged.

Sixth: Section 21-305 (3) provides for service of process upon unincorporated associations which are subject to suit under a common name, by delivering a copy of summons to a managing or general agent, etc. (This may apply only to fraternal benefit societies provided for under Sections 53-701 to 53-705.)

Seventh: Section 21-524 provides for suit by a representative where persons are too numerous to be joined as parties plaintiff or defendant.

I have read many of the cases cited by

both plaintiffs and defendants and I have not found any cases which give to a voluntary association, such as labor unions, the right to sue or be sued, except in cases where the legislature of a State or the Congress of the United States had enacted laws recognizing such unions to such an extent that the courts claimed to be justified in finding that they had been given the status of a legal entity by implication or by express language. It is not necessary to comment on all the cases cited, but I shall content myself to refer only to the case of the United Mine Workers v. Coronado Coal Co., found in 259 U. S. 344, 27 A.L.R. 762. Chief Justice Taft, who wrote the decision in that case, found that the plaintiff union had the right to sue and be sued because of the recognition of labor unions by Congress in the following statutes:

(1) The Clayton Act, tendering to such associations formal incorporation as National Unions.

(2) An act approved August 23, 1912, creating an industrial commission, three of whom were to represent organized labor.

(3) The Transportation Act of 1920, Chapter 91, Section 302-307, 41 Stat. 469, recognizing labor unions in the creation of a railroad labor board of adjustment and for

action by that board upon application being made to it by a labor union.

(4) Act of Congress approved August 5, 1909, and the Act approved October 3, 1913, expressly exempting labor unions from an excise tax.

(5) Act of Congress 1912, Chapter 389 (37 Stat. at L. 550), providing for periodical publications of labor unions to be admitted into the mail as second-class mail.

(6) Act of Congress of August 24, 1912, Chapter 389, Section 6, etc., expressly recognizing the legality of labor unions of postal employees.

(7) And by an Act of Congress approved August 1, 1914, providing that no money appropriated therein should be used to prosecute labor unions under the Anti-Trust Act (38 Stat. at L. 609, 652, Chapter 223).

I question the soundness of the Taft opinion, but in view of the fact that the question is of secondary importance and not necessary to the determination of the ultimate issue in the case, and in order to conserve time and labor, the Court adopts the reasoning therein as controlling here, as the Arizona statutes are more positive in their rec-

ognition of labor unions than the Acts of Congress relied upon by Chief Justice Taft.

It will be noted that nowhere did Congress expressly authorize a labor union to sue or be sued, but Chief Justice Taft held that the above Acts of Congress did have the effect of recognizing such unions as being suable. He recognized that said unions did have an existence separate and apart from the individuals of which it was composed and constituted a legal entity so far as its right to sue and be sued is concerned.

Our statutes as above enumerated recognize the existence of labor unions as having the right to own labels to be used by them and their employer in labeling goods manufactured by the employer by union labor and identifying it as the product of union labor. The Legislature provided for the registration of such labels, and made it a misdemeanor for anyone to use them without authority, etc. This is recognition of a property right in the union as distinguished from its membership and to be exercised by it as such union.

Again, the statute recognizes the right of unions to contract with an employer, and exempts their contract from the operations of the law validating provisions for arbitration in case of dispute. That the above statute is

a recognition of the right to contract by the union cannot be gainsaid, and its exemption from the binding effect of a provision to arbitrate disputes gives it a right that is not enjoyed by others entering into contractual relations.

It would seem that the right to contract carries with it the right to enforce said contract and subjects it to whatever liability the contract imposes upon it; and if such rights are not enforceable in law or equity, they do not possess the essential characteristics of a contract. A contract that is unenforceable ceases to be a contract and should not be dignified by such appellation.

Again, in Section 56-204, the Legislature recognizes the right of the union to contract and fix the scale of wages to be paid by the employer, and requires that the Industrial Commission shall use such scale of wages in fixing the wage to be paid on public works to those doing the same type of work as labor union members.

As above stated, the Arizona statutes are as positive and clear in their recognition of labor unions as existing and vested with rights in addition to those of its individual membership as the Federal statutes cited by Chief Justice Taft. In fact the right to con-

tract and to own a seal or label is more potent in the inference to be drawn therefrom or the implications which necessarily follow to the effect that such unions are legal entities with the right to sue and be sued than is found in any or all the Acts of Congress relied upon by Chief Justice Taft in reaching his conclusion in the Coronado Coal case.

In short, the constitutional amendment herein sought to be found unconstitutional recognizes the validity of labor union contracts and seeks to limit the power of the unions to incorporate in said contracts the so-called closed shop clause.

The doctrine of contemporaneous construction is entitled to some consideration in arriving at whether or not labor unions have a right to sue and be sued inasmuch as our courts have repeatedly recognized such rights. It is true that the question was not raised, but the doctrine of contemporaneous construction applies. However, this doctrine is not necessary to the conclusions reached.

Section 21-524 provides for an action at law by representation in cases of this character. Our Supreme Court has recognized such actions as being entirely justified under our law.

The plaintiff Forrest L. Stiers could maintain this action for all members of his union as representatives of said class. In paragraph sixteen of the complaint, while it perhaps does not fully and concisely allege the requisite facts for such representative action, the allegations are sufficient, though unartfully drawn, to state a cause of action.

The primary object of this action is to determine the constitutionality of the so-called right-to-work amendment to the Arizona Constitution, and it is wholly immaterial whether labor unions have a right to sue and be sued or not so far as the ultimate ends sought are concerned, and this Court has, therefore, been required to devote much time to matters of secondary importance, since the matter may have been determined under proper pleadings in accordance with the provisions of Section 21-524, providing for an action by representation.

The motion to dismiss is therefore denied upon the grounds above stated, for the reasons stated.

The motion to dismiss upon the ground of a misjoinder of parties will likewise be denied, for the reason that Section 21-512 is broad enough to admit of the joinder of said several parties plaintiff.

The Court is of the opinion that far more than half of the complaint is wholly immaterial and irrelevant and in fact has no place in this cause of action, but since the case must be determined upon questions of law and not of fact the Court will not take the time to exercise its right to strike. The motions to strike are therefore denied.

In the event, however, counsel for plaintiffs is of the opinion that evidence will be necessary to substantiate any of the allegations of the complaint in order for the Court to properly determine the issue of the constitutionality or unconstitutionality of said amendment, the Court reserves the right to reject such evidence based upon such immaterial allegations as it believes to be improper.

DONE IN OPEN COURT this the 16 day of May, 1947.

M. T. PHELPS
Judge

(Title of Court and Cause)

ORDER GRANTING MOTION TO DISMISS

Entered: July 25, 1947.

This matter having been under advisement and the Court being now fully advised in the premises, whereupon,

It is Ordered by the Court that the Motion to Dismiss the Complaint is granted, the Court being of the opinion that the Amendment does not violate the 5th nor the 14th Amendment of the Constitution of the United States, nor does it conflict with the National Labor Relations Act. The claim that said Amendment restrains civil right of assembly and speech constituted under the First Amendment of the Federal Constitution has no merits nor does the claim that it is contrary to the Bill of Rights set forth in the Constitution of the State of Arizona, said Amendment is of equal dignity with the said Bill of Rights, being last enacted into law supersedes any previous provisions of the Constitution with which it conflicts.

A study of the cases raises some doubt as to whether or not said Amendment interferes with the freedom of contract, but this doubt is insufficient to overthrow the presumption of its validity and specially to justify a trial Court in declaring it unconstitutional.

(Title of Court and Cause)

JUDGMENT

Filed: July 28, 1947

The Court having on the 25th day of July, 1947, granted the Motion to Dismiss of the Defendants, AMERICAN SASH & DOOR, a corporation; W. B. STEVENS; JOHN L. SULLIVAN, individually; JOHN L. SULLIVAN, as Attorney General of the State of Arizona; D. A. BREWER, and EDWARD L. BEARD, and the plaintiffs having elected to waive their right to ammend their complaint and to stand on their complaint, and thereupon an Order for Judgment having been entered upon the Motion of the above named defendants,

IT IS NOW ORDERED, ADJUDGED AND DECREED:

1. That the Amendment to the Constitution of the State of Arizona, adopted by a vote of the people at the general election on the 5th day of November, 1946, and proclaimed effective on the 25th day of November, 1946, commonly known as the "RIGHT TO WORK AMENDMENT" does not violate the provisions of the Constitution of the United States;

2. That the Amendment to the Constitution of the State of Arizona, adopted by a

vote of the people at the general election on the 5th day of November, 1946, and proclaimed effective on the 25th day of November, 1946, commonly known as the "RIGHT TO WORK AMENDMENT" does not violate the Constitution of the State of Arizona;

3. That the plaintiffs complaint and action herein be and is hereby dismissed;

4. That the defendants' have and recover their costs herein expended.

Done in Open Court this 28th day of July, 1947.

M. T. PHELPS
Judge

Approved as to form,

H. S. McCLUSKEY

July 28, 1947

Attorney for Plaintiffs
above named.

(Title of Court and Cause)

NOTICE OF APPEAL

Filed: July 30, 1947

Notice is hereby given that the above named plaintiffs appeal to the Supreme Court of the State of Arizona from the order of the Court granting defendants' motions to dismiss plaintiffs' complaint, rendered in said court in the above entitled cause on the 25th day of July, 1947, and the judgment entered pursuant thereto on the 28th day of July, 1947, in favor of the above named defendants and against the plaintiffs, and from the whole thereof.

APPEAL BOND RECEIPT AND MEMORANDUM ISSUED JULY 30, 1947

No. 55786 C

Phoenix, Arizona, 7-30, 1947

WALTER S. WILSON
Clerk Superior Court
MARICOPA COUNTY, ARIZONA

RECEIVED OF JOSEPH MORGAN
Two Hundred Fifty ($250.00) DOLLARS

For Bond on Appeal . . . In Cause No. 57575.
A.F.L. vs. American Sash.

WALTER S. WILSON,
Clerk of Superior Court

By C. H. Ward, Deputy.

(Title of Court and Cause)

REQUEST AND ORDER THAT ORIGINAL PAPERS BE SENT TO THE SUPREME COURT IN LIEU OF COPIES.

Filed: July 30, 1947

Come now the plaintiffs, appellants above named, and respectfully request that in lieu of copies of the papers designated on appeal, that the originals of said papers be transmitted to the Supreme Court, for the reason that the pleadings and papers are lengthy, and time and expense will be saved by forwarding the original papers.

(Signature of counsel for plaintiffs)

ORDER

On the foregoing request, and the Court being of the opinion that the original papers, in lieu of copies, should be sent to the Supreme Court upon the appeal of this action,

IT IS ORDERED that the Clerk, in lieu of copies, forward the original papers designated for the record on appeal, to the Clerk of the Supreme Court.

Dated July 30, 1947.

DUDLEY W. WINDES
Judge

(Title of Court and Cause)

Served and Filed: July 30, 1947

APPELLANTS' (PLAINTIFFS) DESIGNATION OF RECORD AND PROCEEDINGS TO BE CONTAINED IN THE RECORD ON APPEAL

Come now the appellants above named, and respectfully designate the following papers and proceedings to be contained in the record on appeal to the Supreme Court:

1. Plaintiffs' Complaint, filed Feb. 12, 1947;

2. Attorney General's Motion to Strike, filed March 15th;

3. Attorney General's Motion to Dismiss, filed March 15th;

4. American Sash and Door Co. and W. B. Stevens' Motion to Dismiss, filed March 15th;

5. American Sash and Door Co. and W. B. Stevens' Motion to Dismiss, filed April 5th;

6. Memorandum Opinion and Order of the Court, dated May 16th, filed May 19th.

7. Order of Court sustaining defendants' motions to dismiss, entered July 25th;

8. Judgment entered July 28th;

9. Notice of Appeal;

10. Memorandum of Cost Bond;

11. Minute entries;

12. Request and Order that Original Papers be sent to the Supreme Court in lieu of copies.

13. This Designation of Papers on Appeal.

The above and foregoing covers and includes the whole record of pleadings and proceedings save and except the following:

1. American Sash and Door and W. B. Stevens' Motion to Strike filed March 15th, and

2. D. A. Brewer and Edward L. Beard Motion to Strike, filed March 24th, which are identical with the Attorney General's Motion to Strike contained in the above designation, and

3. D. A. Brewer and Edward L. Beard Motion to Dismiss filed March 24th, which is identical with the American Sash and Door and W. B. Stevens Motion to Dismiss filed on March 15th, and above designated.

The duplicate motions to strike and motion to dismiss would only encumber the record on appeal and are therefore not designated.

Dated July 30, 1947.

(Signature of counsel for plaintiffs)

Service of copy of the above designation acknowledged this 30th day of July, 1947.

(Signature of counsel for defendants)

MINUTE ENTRIES

(Title of Court and Cause)

March 3, 1947

Comes now H. S. McCluskey appearing as counsel on behalf of the Plaintiffs.

It is ordered granting to all Defendants named in the Complaint until March 15, 1947, to move or plead in the matter.

March 23, 1947

It is ordered setting this cause for hearing on April 5, 1947, 9:30 A. M.

April 5, 1947

Come now H. S. McCluskey and Joseph

H. Morgan appearing as counsel on behalf of Plaintiffs; Moeur & Moeur and Charles N. Walters appear as counsel on behalf of Defendants, American Sash & Door Company, a corporation, and W. B. Stevens.

It is ordered on motion of Mr. Moeur, that attorney Charles L. Strouss is entered of record as associate counsel. W. C. Fields appears as counsel on behalf of Defendants, D. A. Brewer and Edward L. Beard. John L. Sullivan, Attorney General, and Burr Sutter and John W. Rood, Assistants Attorney General, appear as counsel on behalf of Defendant John L. Sullivan, individually and as Attorney General of the State of Arizona.

Mr. Moeur presents an Amended Motion to Dismiss.

Mr. Fields adopts the Amended Motion of Mr. Moeur on behalf of his clients.

Mr. Sutter and Mr. Rood argue on the Motion to Strike, on behalf of Defendant, John L. Sullivan, individually and as Attorney General.

At 11:30 A. M. Court takes a five minute recess.

At 11:40 A. M. Court resumes in this

case. Mr. Moeur argues on the Motion to Strike, on behalf of his clients, American Sash & Door Company and W. B. Stevens.

Mr. Fields adopts the argument of Mr. Moeur on the Motion to Strike on behalf of his clients, D. A. Brewer and Edward L. Beard.

At 12:01 P. M. Court takes a recess until 1:30 P. M.

At 1:40 P.M. Court resumes in this cause. Counsel H. S. McCluskey and Joseph H. Morgan argue for the Plaintiffs in answer to the arguments on the Motions of the Defendants. Charles L. Strouss and Mr. Sutter argue in reply to Plaintiff arguments.

It is ordered the Motions to Strike are taken under advisement.

It is ordered allowing counsel for Defendants until April 25th, 1947, to present briefs. Counsel for Plaintiffs may have five (5) days after briefs are submitted to respond.

April 7, 1947

It is ordered striking Defendants', D. A. Brewer and Edward L. Beard, Motion to

Strike and Defendants' Motion to Dismiss from the Motion Docket.

May 19, 1947

This case having been under advisement, and the Court being now more fully advised in the premises:

It is ordered the Motions to Dismiss are denied.

It is ordered the Motions to Strike are denied for the reasons assigned in the Memorandum of Opinion filed herewith.

May 23, 1947

Come now H. S. McCluskey and Joseph H. Morgan appearing as counsel on behalf of the Plaintiffs; attorneys Moeur & Moeur and Charles L. Strouss are present on behalf of Defendants. Attorney Wm. C. Fields is also present and Attorney General, John L. Sullivan, by Burr Sutter and John W. Rood, Assistants Attorney General are present.

Defendants' Motions to Dismiss are submitted to the Court on briefs.

July 25, 1947

This matter having been under advisement, and the Court being now fully advised in the premises, whereupon,

It is ordered by the Court that the Motion to Dismiss the Complaint is granted, the Court being of the opinion that the Amendment does not violate the 5th nor the 14th Amendment of the Constitution of the United States, nor does it conflict with the National Labor Relations Act. The claim that said Amendment restrains civil rights of assembly and speech constituted under the First Amendment of the Federal Constitution has no merits nor does the claim that it is contrary to the Bill of Rights set forth in the Constitution of the State of Arizona, said Amendment is of equal dignity with the said Bill of Rights, being last enacted into law supersedes any previous provisions of the Constitution with which it conflicts.

A study of the cases raises some doubt as to whether or not said Amendment interferes with the freedom of contract, but this doubt is insufficient to overthrow the presumption of its validity and specially to justify a trial Court in declaring it unconstitutional.

July 28, 1947

Comes now H. S. McCluskey appearing as counsel on behalf of the Plaintiffs, and the Defendants are represented by counsel, John L. Sullivan, Attorney General, by John W. Rood, Assistant Attorney General; Moeur & Moeur, William C. Fields, and Jennings, Strouss, Salmon & Trask.

It is ordered the Plaintiffs refuse to amend and stand on the pleadings as they are now.

On motion of Mr. Fields, it is ordered allowing amendment to his Answer by interlineation by incorporating the third defense: "The Complaint fails to state a claim upon which relief can be granted."

It is now ordered, on motion of the Defendants, Judgment will be entered in accordance with the Order for Judgment heretofore entered.

(Certificate of Clerk of the Superior Court dated August 2, 1947)

(Here follows Exhibit A)

(COPY) Exhibit A

UNITED STATES DEPARTMENT OF LABOR
Frances Perkins, Secretary

BUREAU OF LABOR STATISTICS
Isador Lubin, Commissioner (on leave)
A. F. Hinrichs, Acting Commissioner

◆

Extent of Collective Bargaining and Union Status, January, 1945

(SEAL)

Bulletin No. 829

Letter of Transmittal

United States Department of Labor,
Bureau of Labor Statistics,
Washington, D. C., April 9, 1945.

The Secretary of Labor:

I have the honor to transmit herewith a report on the extent of collective bargaining and union status in effect in January, 1945. This study is based on an analysis of approximately 15,000 employer-union agreements as well as employment, union membership, and other data available to the Bureau of Labor Statistics.

This study was prepared under the general supervision of Florence Peterson, Chief of the Industrial Relations Division. Elizabeth Stark and Philomena Marquardt were in immediate charge of assembling the data.

A. F. HINRICHS, Acting Commissioner.

HON FRANCES PERKINS,
Secretary of Labor.

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Bulletin No. 829 of the United States Bureau of Labor Statistics

(Reprinted from the MONTHLY LABOR REVIEW, April, 1945, with additional data)

Extent of Collective Bargaining and Union Status, January 1945 [1]

UNION AGREEMENT COVERAGE

Some 14½ million workers were employed under collective-bargaining contracts in January 1945. An analysis by the Bureau of Labor Statistics indicates that these workers included approximately 47 percent of all workers employed in industries and occupations in which unions are actively engaged in obtaining written agreements with employers.[2] During the year 1944 there was an increase in agreement coverage of over half a million workers, which was equivalent to a 4.5-percent rise in the proportion of employed workers covered by agreements.

Manufacturing.—Approximately 65 percent (more than 8¾ million) of all production wage earners[3] in manufacturing industries were employed under the terms of union agreements at the beginning of 1945, representing an increase during the year of 8 percent in the proportion of employees working under union agreements.

The largest increases in the proportion of workers under agreement were in the tobacco and chemical industries and, to a less extent, in the canned and preserved foods industry. Agreements were negotiated for the first time with several large aircraft and petroleum-refining companies, as well as with a number of meat-packing, shoe, leather-tanning, and rubber companies.

The degree of union organization at the beginning of 1945 varied considerably among the manufacturing industries, although not so much as among nonmanufacturing industries and trades. Over 90 percent of the production wage earners were working under union agreements in the aluminum, automobile, basic steel, brewery, fur, glass, men's clothing, rubber, and shipbuilding industries, in contrast to only a little more than 10 percent in the dairy-products industry.

[1] For similar data for previous years see Monthly Labor Review, April 1944, February 1943, May 1942, and March 1939.

[2] It is estimated that approximately 30¼ million workers were employed in occupations in which unions are actively engaged in organizing and seeking to obtain written agreements. In most industries this includes all wage and salary workers except those in executive, managerial, and certain types of professional positions. It excludes all self-employed, domestic workers, agricultural wage workers on farms employing fewer than 6 persons, all Federal and State government employees, teachers, and elected and appointed officials in local governments.

It should be noted that the number of workers covered by union agreements is not the same as union membership. Except under closed- or union-shop conditions, agreements cover nonmembers as well as members employed within the given bargaining unit. On the other hand, some union members may be working in unorganized plants and many civil-service employees and teachers are members of unions but are not employed under the terms of bilateral written agreements.

[3] Clerical, professional, service, and construction workers, foremen and truck drivers connected with manufacturing are treated as occupational groups under nonmanufacturing employees.

642506°—45

Proportion of Wage Earners Under Union Agreements in January 1945

MANUFACTURIING INDUSTRIES

80-100 percent	60-80 percent	40-60 percent	20-40 percent	1-20 percent
Agricultural equipment. Aircraft and parts. Aluminum. Automobiles and parts. Breweries. Carpets and rugs, wool. Cement. Clothing, men's. Clothing, women's. Furs and fur garments. Glass and glassware. Meat packing. Newspaper printing and publishing. Nonferrous metals and products. Rubber products. Shipbuilding. Steel, basic. Sugar, beet and cane.	Book and job printing and publishing. Clocks and watches. Coal products. Electrical machinery, equipment, and appliances. Leather tanning. Machinery and machine tools. Millinery and hats. Paper and pulp. Petroleum refining. Railroad equipment. Rayon yarn. Tobacco products. Woolen and worsted textiles.	Baking. Canning and preserving foods. Dyeing and finishing textiles. Flour and other grain products. Furniture. Gloves, leather and cloth. Hoisery. Jewelry and silverware. Knit goods. Leather luggage, handbags, novelties. Lumber. Pottery, including chinaware. Shoes, cut stock and findings. Steel products. Stone and clay products.	Beverages, nonalcoholic. Chemicals, excluding rayon yarn. Confectionery products. Cotton textiles. Paper products. Silk and rayon textiles.	Dairy products.

NONMANUFACTURING INDUSTRIES

Actors and musicians. Airline pilots and mechanics. Bus and street car, local. Coal mining. Construction. Longshoring. Maritime. Metal mining. Motion-picture production. Railroads—freight and passenger, shops and clerical. Telegraph service and maintenance. Trucking, local and intercity.	Radio technicians. Theater—stage hands, motion-picture operators.	Bus lines, intercity. Light and power. Newspaper offices. Telephone service and maintenance.	Barber shops. Building servicing and maintenance. Cleaning and dyeing. Crude petroleum and natural gas. Fishing. Hotels and restaurants. Laundries. Nonmetallic mining and quarrying. Taxicabs.	Agriculture.[1] Beauty shops. Clerical and professional, excluding transportation, communication, theaters, and newspapers. Retail and wholesale trade.

[1] Less than 1 percent.

Nonmanufacturing.—About 33 percent (slightly more than 5½ million) of all nonmanufacturing workers were employed under the terms of union agreements at the beginning of 1945, representing an increase during the year of 6 percent in the proportion of employees working under agreement.

Over 95 percent of the coal-mining, maritime and longshoring, and railroad employees, including clerical and supervisory personnel, and over 90 percent of the employees in the iron-mining and telegraph industries were employed under union agreements.

Nearly 25 percent of the employees in service occupations and slightly less than 20 percent of the clerical and professional employees were under union agreements. A major portion of the clerical and professional workers in the transportation, communications, and public utilities industries and practically all actors and musicians were employed under collective-bargaining agreements. In manufacturing, financial, and business service establishments, and in wholesale and retail trade, only about 13 percent of the clerical and professional employees were under agreement.

UNION STATUS

GENERAL TYPES

The union-status provisions in employer-union agreements can be classified into five general types according to their union-membership requirements and privileges, as well as to the presence or absence of check-off arrangements. The various degrees of union recognition or union security are commonly referred to as closed shop, union shop with or without preferential hiring of union members, maintenance of membership, preferential hiring with no membership requirements, and sole bargaining with no membership requirements. Check-off arrangements are of two kinds, usually referred to as automatic check-off and check-off by individual authorization.

Under the closed-shop agreements all employees are required to be members of the appropriate union at the time of hiring, and they must continue to be members in good standing throughout their period of employment. Most of the closed-shop agreements require employers to hire through the union unless the union is unable to furnish suitable persons within a given period, in which case the persons hired elsewhere must join the union before starting to work.

In contrast to closed-shop agreements, a union-shop agreement provides that employers have complete control over the hiring of new employees and such persons need not be union members when hired. They must, however, become members within a specified time, usually 30 to 60 days, as a condition of continued employment. When a union-shop agreement, in addition to requiring that all employees join the union within a specified probationary period, states that union members shall be given preference in hiring, it differs very little in effect from the closed-shop agreement. In a few cases, employees hired before a closed-shop agreement is signed are exempt from the union-membership requirement.

A maintenance-of-membership agreement requires all employees who are members when the agreement is signed, and all who choose later to join the union, to retain their membership for the duration of the

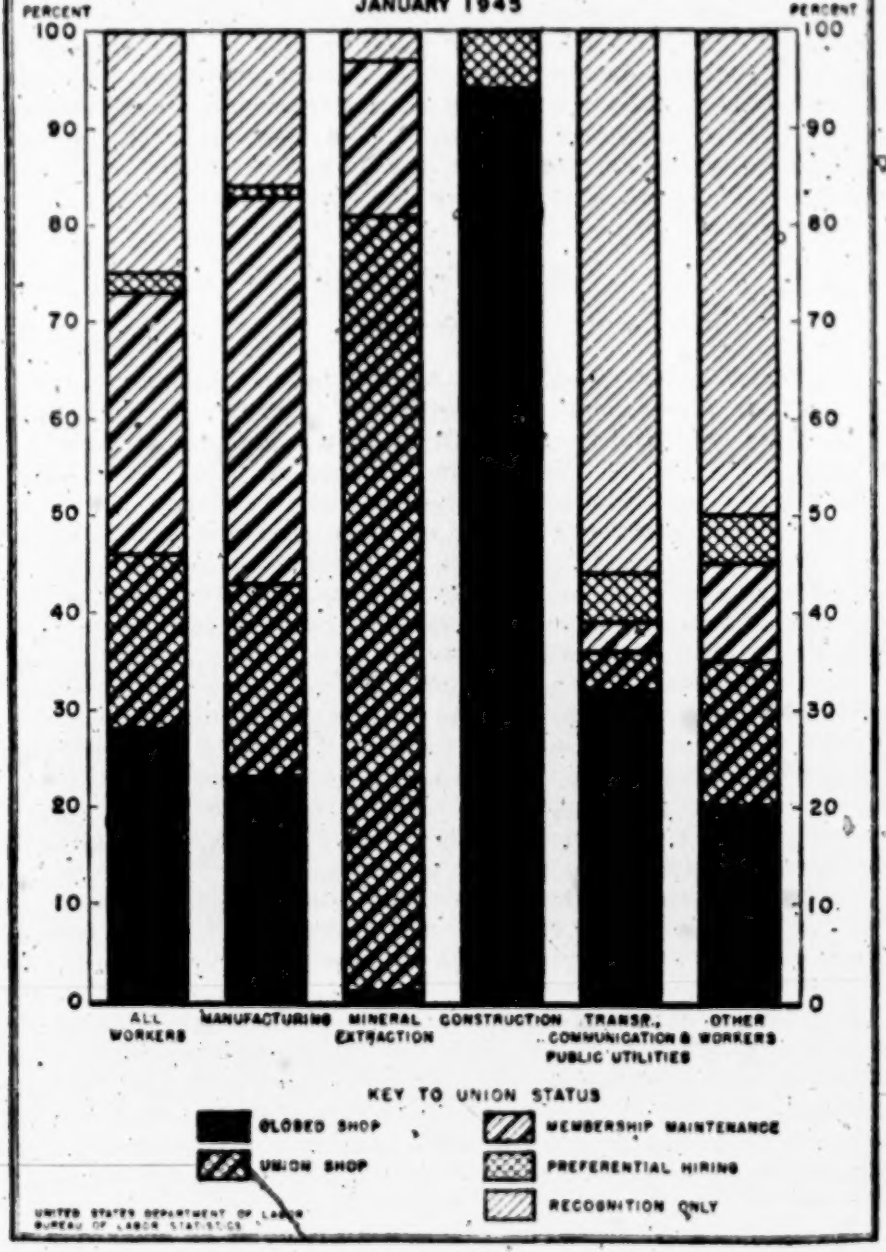
CHART I

PROPORTION OF WORKERS UNDER UNION AGREEMENT

BY UNION STATUS PROVIDED

MAJOR INDUSTRY GROUPS

JANUARY 1945



UNITED STATES DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS

agreement. The maintenance-of-membership provisions established by order of the National War Labor Board allow 15 days during which members may withdraw if they do not wish to remain members for the duration of the agreement.

Some agreements provide for preferential hiring without union-membership requirements. In other words, union members must be hired if available, but otherwise the employer may hire nonmembers and such persons need not join the union as a condition of continued employment.

Some agreements include no membership requirements as a condition of hiring or continued employment. The union is recognized as the sole bargaining agent for all employees in the bargaining unit and is thus responsible for negotiating the working conditions under which all workers are employed, including those who do not belong to the union. This type of agreement, unlike the others, does not enable the union to rely on employment per se to maintain or increase its membership.

Extent of various types of union-status provisions.—although the proportion of workers under closed- and union-shop clauses remained about the same, the proportion under maintenance-of-membership clauses continued to increase during 1944. By January 1945, approximately 27 percent (3¾ million) of all persons employed under union agreements were employed under maintenance-of-membership clauses, an increase during the year of almost 23 percent in the proportion of workers under such agreements. About 28 percent (4 million) of all workers under agreement were employed under closed-shop provisions and about 18 percent (2½ million) under union-shop agreements. (About 7 percent of the latter were covered by agreements which also specified that union members should be given preference in hiring.) Only 2 percent of all workers under agreement were covered by union preferential clauses, whereas 25 percent were under agreements which provided recognition only.

The proportion of workers under agreement covered by various types of union status in January 1945 is shown by chart 1, for major industry groups. All clerical, professional, and service workers are included in the group "other workers." All trucking and warehousing workers are included in "transportation, communication, and public utilities." Except for these occupational groups, workers have been included in the industry in which they are employed.

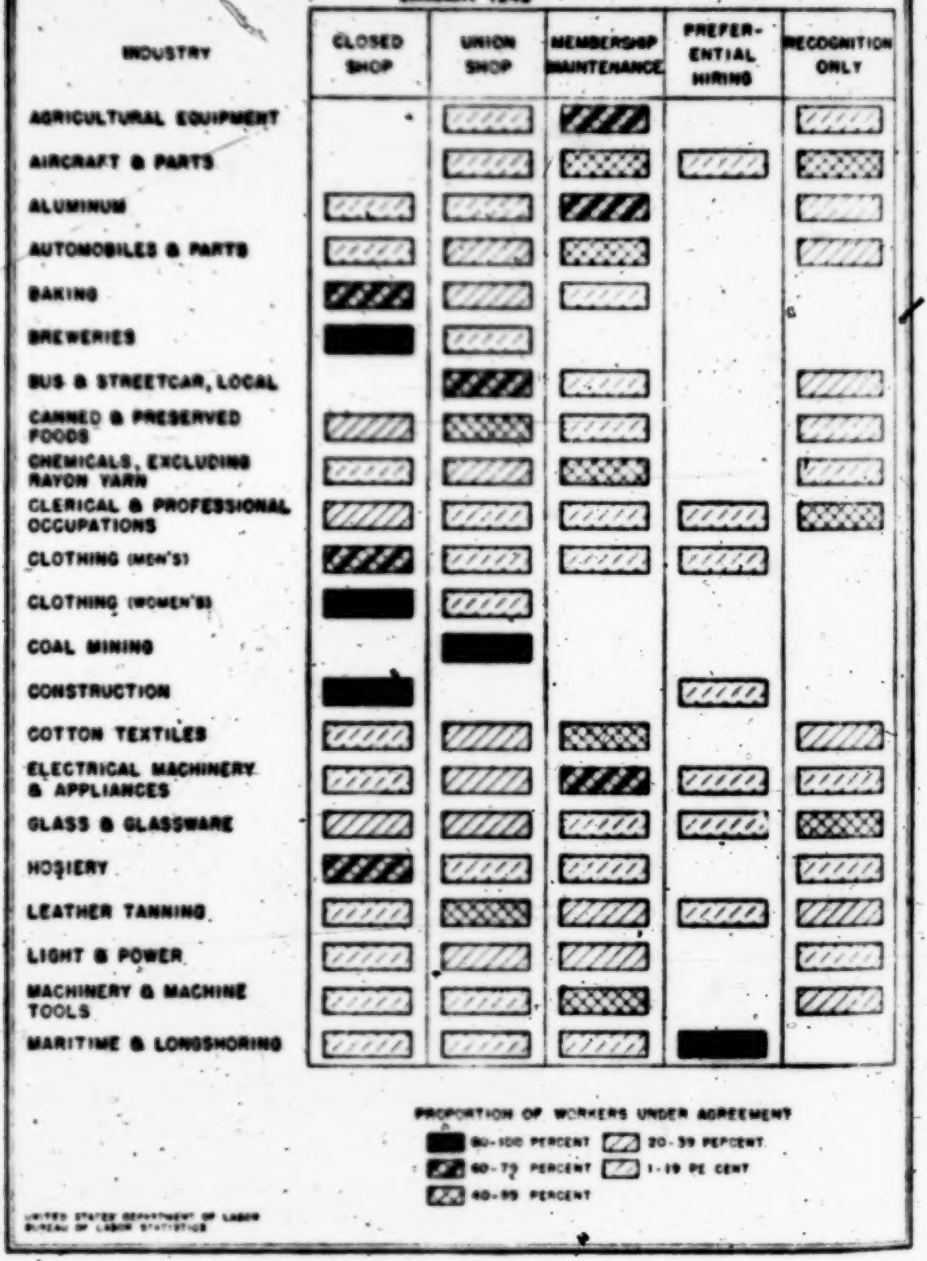
Manufacturing.—In January 1945, closed-shop provisions covered approximately 23 percent of all workers under manufacturing agreements, and union-shop agreements 20 percent—or together a total of about 3¾ million workers. Of the union-shop agreements, about 10 percent also provided that union members should be given preference in hiring. Most of the wage earners under agreement in the bakery, brewery, men's and women's clothing, and printing and publishing industries were employed under closed- or union-shop clauses. Substantial proportions of those under agreement in the hosiery and canned and preserved foods industries, and a majority of those under agreement in the paper, shoe, shipbuilding, and silk and rayon industries, were working under closed- or union-shop provisions.

About 3½ million workers in manufacturing industries were em-

PROPORTION OF WORKERS UNDER UNION AGREEMENT

BY UNION STATUS IN SELECTED INDUSTRIES AND OCCUPATIONS

JANUARY 1945



UNITED STATES DEPARTMENT OF LABOR
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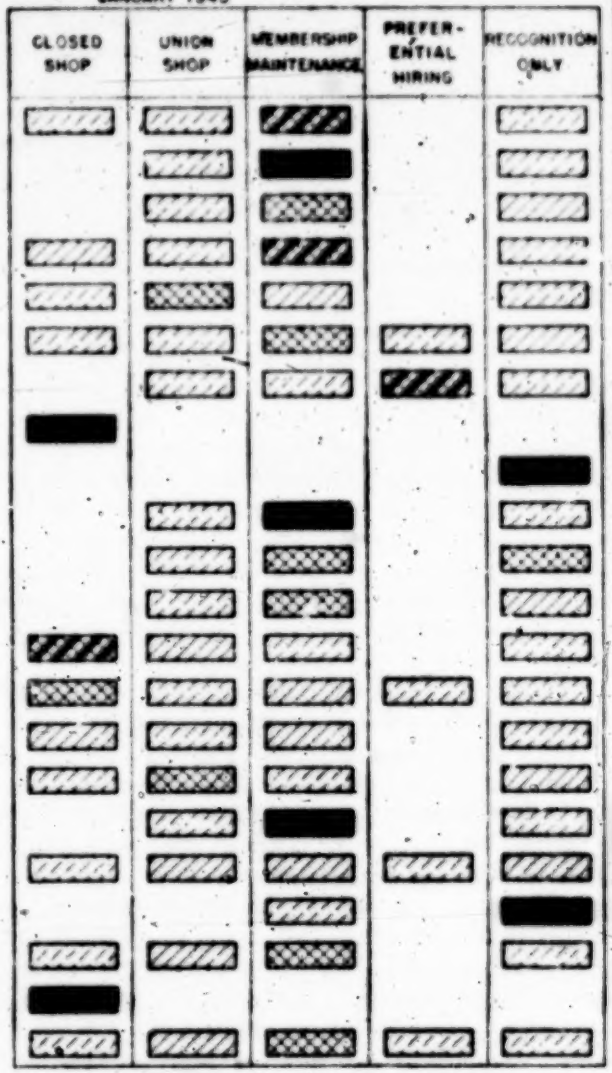
PROPORTION OF WORKERS UNDER UNION AGREEMENT

BY UNION STATUS IN SELECTED INDUSTRIES AND OCCUPATIONS

JANUARY 1945



PROPORTION OF WORKERS UNDER AGREEMENT

80-100 PERCENT
60-79 PERCENT
40-59 PERCENT
20-39 PERCENT
1-19 PERCENT

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS

clauses. They included 40 percent of all workers under manufacturing agreements, representing an increase of about 14 percent during the year in the proportion employed under such agreements. The greatest increase over the previous year in the proportion working under maintenance-of-membership clauses occurred in the nonferrous-metals alloying, rolling and drawing industry (from less than 15 percent to over 50 percent), but there were very substantial increases in the machinery, and machine-tool, nonferrous-metals smelting and refining, tobacco, woolen and worsted textile, and electrical-machinery industries. At the beginning of 1945 maintenance-of-membership clauses covered most of the employees under agreement in the basic steel industry, a substantial proportion of those in the agricultural and railroad equipment and meat-packing industries and a majority of those under agreement in the aluminum, automobile, electrical-machinery, machinery and machine-tool, rubber, tobacco, woolen and worsted textile industries and in the nonferrous-metals alloying, rolling, drawing, smelting and refining industries.

Only about 1 percent of all manufacturing workers under agreement were employed under preferential-hiring provisions with no union-membership requirements. In only one manufacturing industry, pottery, were such clauses common.

About 16 percent of the workers under agreement in all manufacturing industries were employed in plants which recognize the union as sole bargaining agent but do not require union membership as a condition of hiring or continued employment. In the rayon-yarn industry slightly more than half of those under agreement were covered by such clauses and between a third and a half of those in the cotton textile, petroleum and coal products, nonferrous-metals alloying, rolling, and drawing, aircraft, and glass industries.

Nonmanufacturing.—Approximately 36 percent of all workers under agreements in nonmanufacturing industries and occupations were covered by closed-shop provisions and about 16 percent by union-shop provisions—a total of more than 2¾ million workers. Only a few of the union-shop agreements also provided that union members should be given preference in hiring. The closed shop was provided in almost all agreements in building construction and trucking and in many of the agreements covering service and trade employees such as barbers and employees in building service, laundry, dry cleaning, and food establishments. Coal miners and a majority of the organized bus and street-railway employees were under union-shop agreements.

About 6 percent of the nonmanufacturing workers under agreement were employed under membership-maintenance clauses. The greatest increase over the previous year in the proportion working under such clauses occurred in wholesale and retail trade, metal mining, and crude petroleum and natural gas; in the two last-named industries the majority of the employees were covered by such clauses.

Only 4 percent of all nonmanufacturing workers under agreement were employed under agreements with preferential-hiring provisions but no union-membership requirements. Only in maritime and longshoring are such clauses common.

About 38 percent of the workers under agreement in all nonmanufacturing industries and occupations were employed under contracts which recognized the union as sole bargaining agent but included

no membership requirements. More than half of these workers were employed in the railroad industry, where virtual union-shop conditions prevail, although the agreements do not provide for union-shop arrangements.

CHECK-OFF ARRANGEMENTS

During 1944 there was an increase of about 28 percent in the proportion of workers under agreements who were covered by some form of check-off provisions. Almost 6 million workers, or more than 40 percent of all employees under agreement, were covered by check-off provisions in January 1945. About half were covered by clauses providing for the automatic check-off of all members' dues and the other half by clauses which provide for check-off only for those employees who file individual written authorizations with the employer. Under some of the latter agreements the authorizations, once made, continue in effect for the duration of the agreement; under others they may withdrawn whenever the employee desires. (If working under a closed- or union-shop or maintenance-of-membership agreement, however, the employee must personally pay his dues to the union if he cancels his check-off.) Although most of the check-off clauses provide that all dues and assessments levied by the union shall be collected, some specify "regular dues only" or check-offs not to exceed a given amount.

Manufacturing.—Almost 4½ million workers, or more than half of all workers under agreement in manufacturing industries, were employed at the beginning of the year under agreements which provide for check-off. Slightly fewer manufacturing workers were covered by automatic check-off arrangements than by provisions for check-off upon individual authorization.

During 1944 the proportion of workers under check-off arrangements increased about 38 percent. Most of the increase in the proportion under agreement with check-off arrangements took place in shipbuilding, although there were considerable increases in the railroad-equipment and nonferrous-metals alloying, rolling, and drawing industries. Over 90 percent of the workers under agreement in the basic steel, railroad-equipment, and hosiery industries were covered by check-off provisions, and the great majority of those in the cotton-textile, meat-packing, nonferrous-metals alloying, rolling, and drawing, shipbuilding, silk and rayon textile, and woolen and worsted textile industries.

Nonmanufacturing.—About 1½ million, or 26 percent of the workers employed under agreements in nonmanufacturing industries, were covered by some form of check-off arrangement. Most of thesecheck-off clauses, including those covering coal miners, specify that the employer is to deduct the union dues and assessments from the wages of all members. The agreements for about a third of the nonmanufacturing employees covered by check-off clauses provided for check-off only upon authorization of individual employees.

[fol. 110] IN SUPREME COURT OF ARIZONA

Assignments of Error Appearing in Appellants' Brief Filed and Presented to the Supreme Court of Arizona on the 9th Day of September, 1947—Pages 11-13, in Cause No. 5028, American Federation of Labor, et al., Appellants, vs. American Sash & Door Company, et al., Appellees

ASSIGNMENTS OF ERROR

I

The Court erred in holding the amendment to be valid and constitutional and in granting defendants' motion to dismiss plaintiffs' complaint, and entering judgment of dismissal in favor of the defendants, for the reason that the facts set forth in the complaint, admitted by the motion to dismiss, disclose that no actual need or necessity existed for the suppression of union-shop contracts, that in fact such agreements are of benefit to the public, and that upon no reasonable theory the amendment contributed to the public welfare, but is arbitrary, unreasonable and excessive, and that it therefore became the duty of the court to declare the measure invalid and unconstitutional, and set it aside as being violative of constitutional guaranties against the impairment of the obligation of and freedom to enter into contracts, as prayed for in the complaint.

II

The Court erred in holding that the amendment was constitutional, and in dismissing plaintiffs' complaint and entering judgment for defendants, for the reason that it clearly appeared that the measure was and is void and invalid, in that it constitutes class legislation and is discriminatory, and is, therefore, void under the equality provisions of the Fourteenth Amendment of the United States Constitution.

III

The Court erred in holding the amendment valid and in dismissing plaintiffs' complaint and rendering judgment [fol. 111] for the defendants, for the reason that the measure impairs and prevents the exercise of civil rights of assembly and speech, by the prohibition of union shop agree-

ments, without which organizations of laborers, for the purpose of assembly, speech and security, are wholly ineffective.

IV

Specifically, the court erred in holding that the obligation of contracts existing at the effective date of the act, were voided by the amendment, and in dismissing plaintiffs' complaint as to such contracts and entering judgment for the defendants, for the reason that it clearly appears from the terms of the act that the prohibition is directed and confined to the execution of contracts after the amendment became effective.

[fol. 112] IN THE SUPREME COURT OF ARIZONA

No. 5028

AMERICAN FEDERATION OF LABOR; ARIZONA STATE FEDERATION OF LABOR; Phoenix Building and Construction Trades Council; United Brotherhood of Carpenters and Joiners of America; Millmen, Cabinet Makers and Lumber Handlers Union, No. 2093; Forest L. Stiers, individually and as President of Local Union No. 2093, and Ralph Henley d.b.a. Ralph Henley Millwork, Appellants,

vs.

AMERICAN SASH & DOOR COMPANY, a Corporation; D. A. BREWER; W. B. Stevens; Edward L. Beard; James R. Miller, and John L. Sullivan, individually and as Attorney General of the State of Arizona (succeeded by Evo De Concini as Attorney General who has been substituted as a party defendant), Appellees

Appeal from Superior Court of Maricopa County

Honorable M. T. Phelps, Judge

Judgment Affirmed

J. H. Morgan and H. S. McCluskey, of Phoenix; Herbert S. Thatcher, of Washington, D. C.; Minne & Sorenson, and George Wilson, of Counsel, of Phoenix, Attorneys for Appellants.

John L. Sullivan, Attorney General; John W. Rood, Chief Asst. Atty. Genl.; Moeur & Moeur; Jennings, Strouss, Salmon & Trask; J. A. Riggins, Jr. Henry S. Stevens, Burr Sutter, all of Phoenix, Attorneys for Appellees.

[fol. 113] OPINION

UDALL, J.:

This appeal involves a determination of the constitutionality of what has been commonly styled the "Right to Work" Amendment to the Arizona Constitution. For reasons which will be later developed, we have neither the duty nor the right to consider or judge the wisdom of this legislation or its practicability. Our function is limited to finding whether it offends the Constitution of the United States. The people of the State of Arizona at the general election held in 1946 adopted an Amendment to the Constitution of the State of Arizona, reading as follows:

> "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the state, or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization." (Petition and Governor's Proclamation validating it appear in 1947 Session Laws of Arizona at page 399.)

The Amendment (and as such it will hereafter be designated) became effective upon proclamation by the Governor dated November 25, 1946. On February 12, 1947, the appellants (plaintiffs below), as representatives of one segment of labor, filed this civil action to procure a declaratory judgment (under Article 7, Chapter 27, A. C. A. 1939) in respect to its validity, interpretation and effect, and for injunctive relief against its enforcement.

The trial court, while denying motions of appellees (defendants below) to strike portions or all of the forty-page complaint, commented that "far more than half of the complaint is wholly immaterial and irrelevant" but it granted their motion to dismiss the complaint. Appellants having elected to stand thereon, judgment was entered dismissing

the action, and from the order and judgment of dismissal this appeal was taken.

No testimony was taken in the court below, and we have properly before us no conclusions of law, but only the facts well pleaded in the complaint (and, therefore, impliedly admitted by appellees by their motion to dismiss), together with such other matters of which we may take judicial notice.

Parties to Suit

The appellants are various national and local labor organizations affiliated with the American Federation of Labor and an employer and an employee, all of whom have entered into or desire to enter into union-security agreements in Arizona. The appellees are: (1) The Attorney General of Arizona (the present incumbent Evo De Concini having been substituted for, and having adopted the same position as, his predecessor) who, as the chief law enforcement officer, it is alleged, had threatened to institute civil and criminal proceedings against all persons violating said Amendment; (2) various employers who are parties to union-security agreements; and (3) individual employees whose employment status would be affected by reason of such agreements.

Issues

By appropriate assignments of error and propositions of law, appellants challenge the Amendment as being either invalid and unconstitutional, or at least inoperative as to certain contracts, for the following reasons: (1) the Amendment arbitrarily and unreasonably impairs the obligations of existing contracts and deprives both unions and employers of freedom of contract; all in violation of Article 1, Section 10, of the United States Constitution and the dues process clause of the Fourteenth Amendment. (2) The Amendment constitutes class legislation and is highly discriminatory, denying unions and union members the equal protection of the laws contrary to the Fourteenth Amendment. (3) The Amendment impairs and previously restrains the exercise of the civil rights of assembly and speech guaranteed under the First Amendment. (4) In the event the Amendment be held valid by this court, appellants contend that it does not apply to contracts now exist-

[fol. 114]

ing which were entered into previous to the effective date of its adoption.

[fol. 115] In the court below appellants urged that the Amendment was invalid because it was in conflict with the Wagner Act. However, since passage by Congress of the Taft-Hartley Act, they have, for obvious reasons, abandoned this ground in presenting the instant appeal.

Neither need we here determine whether said Amendment is self-executing as this was not advanced either in the assignments of error or in the arguments contained in the briefs. It is evident, at least, that the Eighteenth Legislature considered additional sanctions necessary because that body, in regular session assembled, enacted four measures (Senate Bills numbered 3, 65, 66, & 67) to implement it. Senate Bill No. 65 became a law (Chapter 81, Session Laws of Arizona, 1947, at page 173) with the Governor's approval on March 20, 1947. That law provides for injunctive relief and suits for damages for violations of the Amendment and also declares contracts prohibited by it to be illegal and void. No criminal penalties are prescribed. The other three measures (providing for conciliation of labor disputes, the enforcement by suits at law of collective bargaining agreements, and prohibiting secondary boycotts) never became law by reason of being vetoed by the Governor after adjournment of the legislature. These measures appear with other vetoed bills on pages 414 to 423 inclusive of the 1947 Session Laws.

The authority of the people of Arizona to amend their Constitution is unlimited except where prohibited by the Federal Constitution or in conflict with federal law enacted pursuant to constitutionally granted authority. However, an amendment has no greater validity and stands on no higher plane than legislative enactment insofar as being subject to attack for failure to square with the Federal Constitution. Miss. & Mo. R. R. Co. v. McClure, 10 Wall. 511, 19 L. Ed. 997; Denver v. New York Trust Co., 187 Fed. 890, 225 U. S. 707; New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 31 L. Ed. 607.

[fol. 116] *Police Power*

Counsel for appellees concede that justification for the Amendment in question must be found under what has been judicially termed the "police power" of the state. There

is, in the strict sense, no federal police power, A. F. of L. v. Watson, 60 F. Supp. 1010, because that is one of the powers impliedly reserved to the states by the Tenth Amendment. Justice Taney in License Cases, 5 Howard 504, 583, 12 L. Ed. 257, defined the police powers of a state as being "nothing more or less than the powers of government, inherent in every sovereignty to the extent of its dominions." This undefined power of government covering the health, safety, or welfare of the people bears the same relation to the state that the principle of self-defense bears to the individual.

The Question

Recognizing, then, that the liberty to, and right of, contract are not absolute and unyielding but are subject to being limited, restrained, and circumscribed in the interest of the state and the welfare of its people, the question here is: Was the police power of the state (by the people's adoption of the Constitutional Amendment here under review) so unreasonably, arbitrarily, or capriciously exercised as to be unconstitutional and therefore void?

Freedom to Contract—Due Process

Appellants' first assignment of error and proposition of law state, in effect, that the Amendment under consideration is unconstitutional: first, in that it violates that part of Article 1, Section 10 of the United States Constitution which says "No state shall . . . pass any . . . law impairing the obligation of contracts . . ."; and, second, in that it is also violative of that part of the Fourteenth Amendment which sets forth the proposition that "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; . . .".

[fol. 117] It is well settled that for certain proper purposes the state may limit the constitutionally guaranteed freedom to, and sanctity of, contract. Appropriate exercise of the state's police power, e.g., legislation in the interest of the public health, safety, and welfare, has been held to be such a purpose. And relations between employer and employee have been recognized by the United States Supreme Court to be proper subjects for legislative regulation under the state's police power to legislate for the general welfare. Thornhill v. Alabama, 310 U. S. 88, 84 L. Ed. 1093;

Carpenters etc. Union v. Ritter's Cafe, 315 U. S. 722, 86 L. Ed. 1143; West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. Ed. 703; 11 Am. Jur., Constitutional Law, section 345, and cases therein cited. It would serve no useful purpose to multiply authorities or extend this opinion with examples of such use of the police power.

There is no disagreement between the litigants that the Amendment under consideration is an attempted use of the police power; and as such it must stand or fall. The first task, then, is to determine by what standards a court should judge whether such power has been properly used. Both appellants and appellees direct our attention to, and rely for the most part upon, the standards for judgment set forth in three landmark decisions of the United States Supreme Court and one decision from this court. Nebbia v. New York, 291 U. S. 502, 78 L. Ed. 940; West Coast Hotel Co. v. Parrish, supra; Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398, 78 L. Ed. 413; State v. Childs, 32 Ariz. 222, 257 P. 366, 54 A.L.R. 736.

In the Nebbia case the question for decision was whether the New York statute fixing the minimum selling price for milk violated the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. The United States Supreme Court sustained the validity of the New York law stating in part:

> [fol. 118] "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that *the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.* * * *"
>
> * * * * * * *
>
> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation

adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a *reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied,* and judicial determination to that effect renders a court functus officio. * * * *With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal.* The courts of decision in this court exhibit a firm adherence to these principles. Times without number we have said that the *legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity,* and that though the court may hold views inconsistent with the wisdom of the law, *it may not be annulled unless palpably in excess of legislative power.*" (Emphasis supplied.)

In State v. Childs, supra, this court was faced with the question of whether a statute which required, among other things, that patent or proprietary drugs be sold only by registered pharmacists was a proper exercise of the police power to legislate for the public health and safety. In denying that it was a proper exercise of the power this court said:

"* * * *while every presumption is in favor of the validity of a statute, yet when it clearly appears that on no reasonable theory could such a one contribute to the public health or safety,* it is the duty of the courts to so declare and to set it aside as unconstitutional, * * *. (Citing cases.)"

* * * * * * *

"* * * This (police power is, no doubt, a very broad one, and, within its legitimate sphere, a very useful one. It is wholly within the discretion of the Legis- [fol. 119] lature when to exercise it, and to determine what are the best means to accomplish the desired object. *Courts will never assume to determine whether the law is a wise one, or whether the Legislature has adopted the best means.* Yet there is a limit to this

power. A law enacted in the exercise of the police power must, in fact, be a police law. * * * It is, at least, settled that, *if it is apparent on the face of the act that its provisions, from their very nature, cannot and will not conduce to any legitimate police purpose, it is the right as well as the duty of the court to pronounce it* invalid. * * *." (Emphasis supplied.)

In West Coast Hotel Co. v. Parrish, supra, the Supreme Court upheld as a valid exercise of the police power a law of the State of Washington which authorized the fixing of minimum wages for women. In that case the court specifically reaffirmed its holding in the Nebbia case quoting much of the same language from it that we have here set out as the standard, test, or measure by which to judge whether the police power has been appropriately exercised.

In Home Building & Loan v. Blaisdell, supra, the Supreme Court upheld a Minnesota law extending the period of redemption in mortgage foreclosures as against the contention that such law impaired the obligation of existing mortgages. The court, after restating the proposition that proper police legislation may justify state regulation of contract rights, said:

> "* * * The question is not whether the legislation affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." * * *"

Other pronouncements of the United States Supreme Court on the subject of the standard or test by which the validity of the exercise of police power is judged are as follows:

> "* * * But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—*cannot be defined by any precise or universal formula.* Each instance of asserted conflict must be determined by itself, and it has been said many times that *each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the* legislation and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some con

stitutional restraint, or that the public welfare is not subserved by the legislation. *The legislature is, in the* [fol. 120] *first instance, the judge of what is necessary for the public welfare, and a judicial review of judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance.*" Erie R. Co. v. Williams, 233 U. S. 625, 58 L. Ed. 1155. (Emphasis supplied.)

"* * * Hence, in passing on the validity of present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. *Its function is only to determine whether it is possible to say that the legislative decision is without rational basis.* * * *" Clark v. Paul Gray, 306 U. S. 583, 83 L. Ed. 1001. (Emphasis supplied.)

See also: Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. Ed. 283; Ex Parte McCardle, 7 Wall. 506, 19 L. Ed. 264; Soon Hing v. Crowley, 113 U. S. 703, 28 L. Ed. 1145; South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177, 82 L. Ed. 735; Stephenson v. Binford, 287 U. S. 251, 77 L. Ed. 288; Standard Oil Co. v. Marysville, 279 U. S. 582, 73 L. Ed. 857; Nashville, etc., Ry. Co. v. White, 278 U. S. 456, 73 L. Ed. 453; McLean v. Arkansas, 211 U. S. 539, 53 L. Ed. 315; Tanner v. Little, 240 U. S. 369, 60 L. Ed. 691; Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549, 53 L. Ed. 329; Arizona Copper Co. v. Hammer, 250 U. S. 400, 63 L. Ed. 1059; Gant v. Oklahoma City, 289 U. S. 98, 77 L. Ed. 1058; Bayside Fish Flour Co. 1. Gentry, 297 U. S. 422, 80 L. Ed. 772.

Yardstick

These quotations have been set forth at the risk of lengthening this opinion in order to demonstrate that the test is not an exact one, but that from the pronouncements of the United States Supreme Court we can obtain at least some general guidance as to a standard by which to judge the validity of such legislation. Summed up, it might be stated like this: The right of contract may be regulated by proper use of the police power of the state. Legislation in aid of this police power carries with it a strong presumption of validity, placing the burden of proof upon him who at-

tacks it. It is not the province of the courts to review either the wisdom or practicability of the Amendment, nor does the earnest conflict of opinion on these matters bring it within judicial cognizance. Such legislation can be annulled by court decision only if it is palpably in excess of [fol. 121] legislative power, if it is without any rational basis, and if on no reasonable theory could it contribute to the public health, welfare, or safety.

Reasonableness & Discrimination

Nor is the Amendment in question indefensible on the grounds of reasonableness. The National Labor Relations Act prohibits "yellow dog" contracts in much the same fashion as our own legislature has prohibited them in Arizona, Sections 43-1608 and 56-120, A. C. A. 1939. The United States Supreme Court has sustained this federal legislation, N. L. R. B. v. Jones & Laughlin S. Corp., 301 U. S. 1, 81 L. Ed. 893; Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177, 85 L. Ed. 1271. If it is proper to legislate to the effect that no employee shall be forced, as a condition of employment, to be a nonunion man, it would seem that legislation providing that no employee shall be forced, as a condition of employment, to be a union man, would be but a logical counterpart. Appellants attempt to answer this by an interesting contradiction within their own briefs. On the one hand they direct our attention to outdated and overruled cases and annotations holding anti-yellow dog contract legislation invalid. They admit that the Arizona statutes have never been tested, but suggest by implication that if tested they would, on the basis of this old line of decisions, be found invalid. Then, they conclude, "That if a law which prohibits an employer from denying employment to a union member is invalid, then the converse is true, and the amendment which prevents an employer from denying employment to a nonunion laborer is also invalid." However, in their own opening brief they recognize that "yellow dog" contracts now can be and are constitutionally outlawed, and that their own citations to the contrary are now obsolete, overruled, and no longer the law when they state that "the state can constitutionally outlaw the so called 'yellow dog' contract whereunder nonmembership in the union is required as a condition of employment." (The old line of cases upholding "yellow dog" contracts was

[fol. 122] based upon Coppage v. Kansas, 236 U. S. 1, 59 L. Ed. 441. As was stated in Phelps Dodge Corp. v. N. L. R. B., supra, "The course of decisions in this Court since Adair v. United States * * * and Coppage v. Kansas * * * have completely sapped those cases of their authority.")

Appellants then continue with the other half of their contradiction. Assuming this time that our anti-yellow dog contract statutes are valid, they contend that the Amendment under consideration is discriminatory and unconstitutional by the terms of the Fourteenth Amendment in that it constitutes an "outrageous denial" to unions and union members of equal protection of the law. The gist of their argument is this: "Neither section (46-1608 or 56-120, A. C. A. 1939, invalidating yellow dog contracts) makes it unlawful for the employer to deny employment to a union man or to discharge him on the ground that he is a member of a union. The sections are limited in operation to the execution of contracts whereby the employee agrees not to remain or become a member of a labor organization. While the employer, if the sections are valid, would have no right to enter into the contracts condemned, he would have the undoubted right to refuse to hire a union man, and the right to discharge him upon the ground that he was a member of the union."

Appellants concede that in the field of interstate industries the National Labor Relations Act provides the protection they seek. In regard to those industries whose business is wholly intrastate we must point out that the equal protection clause requires only "that all persons subject to such legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and liabilities imposed." Hayes v. Missouri, 120 U. S. 68, 30 L. Ed. 578. There is no question but that this test is here met. Nor is it necessary for the people to have encompassed in one constitutional amendment a corrective for all the evils which may or do arise in the field of employer-employee relations.

> [fol. 123] * * * This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its re-

strictions to those classes of cases where the need is deemed to be clearest.' *If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.'* There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms.' * * *" West Coast Hotel Co. v. Parrish, supra. (Emphasis supplied.)

* * * * * * *

"* * * *We have frequently said that the legislative authority exerted within its proper field, need not embrace all the evils within its reach.* The Constitution does not forbid 'cautious advance, step by step,' in dealing with evils which are exhibited in activities within the range of legislative power. * * *" N. L. R. B. v. Jones & Laughlin S. Corp., supra. (Emphasis supplied.)

* * * * * * *

"Any legislation in exercise of the police power must perforce affect in different degrees persons or groups within its orbit who occupy different economic, social or political positions with reference to the ends sought by the legislation. Thus Chapter 328 may enable a non-union workman to obtain a 'free ride' by receiving benefits attained through the expense and efforts of union workmen, but neither this nor other illustrations which might be given of the variable incidences of the statute upon persons differently circumstanced can render the Act discriminatory. Chapter 328 is geographically coextensive with the State of North Carolina and its provisions are applicable with the same force to all employers within those boundaries just as they are applicable to all employees therein. It is difficult to see how, within the scope of its authority, the statute could be more uniform in its application." State v. Whitaker, N. C., decided Dec. 19, 1947, not yet reported. (Emphasis supplied.)

We hold that by this standard the Amendment is not discriminatory, and, hence, appellants' assignment of error No. 2 is without merit.

Pro and Con

As stated before, because of the presumption that the Amendment is a proper exercise of the police power in the interest of the public, the burden is upon appellants to establish that it is without rational basis. To sustain this [fol. 124] burden they earnestly contend that such a law strikes at the roots of the security of unionism as an institution, and that enforcement of the Amendment will eventually destroy labor organizations in Arizona. Argueudo, they say that outlawing any type of union-security agreement (whether the traditional union shop, closed shop, or maintenance of membership) destroys the principle which, as Justice Jackson said, is the "ultimate goal of most union endeavor." Wallace Corp. v. N. L. R. B., 323 U. S. 248, 89 L. Ed. 216. Union security agreements, they claim, have never been judicially held malum in se but on the contrary are an established practice in modern industrial society and have been uniformly recognized and upheld throughout the nation. They contend that any abuses or injurious practices that may exist therein may be readily corrected by legislation aimed specifically at such abuses without absolute prohibition of union-security contracts. They further point out that such agreements are of benefit to organized labor in that they are designed to gain job security, protection from discrimination, equality of bargaining power, and the promotion of better working conditions for all employees; that with such agreements in force disciplinary action may be more effectually imposed upon workers to compel their compliance with existing contracts; and, finally, that they eliminate jurisdictional strife and result in better labor-management cooperation. Incidentally, they point out, such agreements eliminate the "free riders" (nonunion members who benefit by union efforts but do not share the costs). All in all, they conclude, that there are no overwhelming evils incident to the union-security relationship that can be cured only by prohibitory legislative fiat such as the Amendment in question. Based upon their contention that circumstances do not warrant the suppression of such agreements, they charge the Amendment to be arbitrary, unreasonable, and excessive.

Appellees, however, maintain that appellants' claim as to injuries resulting from the Amendment are "more fanciful than real" in that the Amendment does not discriminate

against union members, prohibit membership in a union, [fol. 125] or interfere with well-established collective bargaining processes such as the right to strike and to picket peaceably. Furthermore, appellees contend that the Amendment was enacted through the initiative by the people of the State of Arizona (our supreme legislative power) to eliminate bona fide abuses that had arisen in the field of labor-management relations, and to overcome the evils incident to the closed shop. This was an effort by the legislative department to satisfy what they believed were the demands of public welfare by diminishing in part the area of permissible conflict open to industrial combatants. Evidently the people of Arizona determined that in the public interest the weapons which labor might use in obtaining its ends required further restriction. On the national scene the Taft-Hartley Act undoubtedly was adopted for that very purpose. (See Committee Reports of the 80th Congress, First Special Session, Senate Report No. 105 and House Report 245 outlining existing abuses.) From the 1946 Initiative and Referendum Publicity Pamphlet and from appellees' brief we summarize some of the evils and abuses alleged to have arisen: (1) a monopoly of labor which the closed shop fosters such being its ultimate goal; (2) "feather-bedding," (doing less than a worker is capable of, caused by restrictive union rules); (3) secondary boycotts; (4) jurisdictional disputes. Affirmatively appellees assert that the Amendment aids in establishing industrial peace and, above all, that it prohibits a denial or abridgment of any person's right to obtain or retain employment because of nonmembership in any labor organization.

The people of the State of Arizona evidently had some deep-seated convictions upon these matters for it required the signatures of fifteen per cent of the qualified electors of the entire state to even propose an amendment to the Constitution (Article 4, Part 1, Section 2), and it is a matter of common knowledge that the arguments for and against the proposed Amendment were fully and completely presented to the people in the pre-election campaign. In adopt- [fol. 126] ing the Amendment by a very substantial majority (61,875 votes cast for and 49,557 cast against said measure) the people have in the most solemn manner evidenced their conviction that the matters prohibited by it were detrimental to the public welfare. We are not called upon here to determine either the wisdom of the people's

action or who is right and who is wrong in the opposing arguments here summarized. Possibly only time can give a correct answer to this highly controversial question. Our sole concern is whether the Amendment is in violation of the federal organic law. The test we must apply is simply to discover whether the law "has a rational basis" and "could on any reasonable theory contribute to the public welfare." The considered and deliberate action of the people of Arizona has determined this in the affirmative; rule by the majority is the essence of democracy.

Effect of Similar Legislation

In his famous dissenting opinion in Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254, Justice Brandeis said:

> "* * * Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread, and has been reached after deliberation. * * *"

See also Muller v. Oregon, 208 U. S. 412, 52 L. Ed. 551. In this regard it is instructive to note that within a fairly short space of time no less than sixteen states have adopted similar legislation, four by constitutional amendment (Arizona, amendment adopted Nov. 1946; Arkansas, amendment adopted Dec. 1944; Florida, amendment adopted Nov. 1944; Nebraska, amendment adopted Nov. 1946) and twelve by statute (Delaware 1947, Georgia 1947, Louisiana 1934, Maryland 1939, Maine 1947, North Carolina 1947, North Dakota 1947, South Dakota 1945-Const. Amend. 1947, Tennessee 1947, Texas 1947, Virginia 1947, Iowa 1947). In New Mexico the legislature has submitted a similar constitutional amendment to the people for their [fol. 127] approval. The lower courts of three of the above states have recently upheld these statutes as not being in conflict with the state and Federal constitutions. A. F. of L. v. American Sash & Door Co. (Ariz., July 28, 1947—this case); Federal Firefighters of Oak Ridge v. Roane-Anderson Co. (Tenn., April 15, 1947); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co. (Nebr., July 7, 1947). In addition, the North Carolina Supreme Court in a well-reasoned opinion has sustained the validity of its

statute (State v. Whitaker, December 19, 1947); and a three-judge Federal District Court for the Southern District of Florida did likewise with the Florida statute (A. F. of L. v. Watson, 60 F. Supp. 1010, reversed by the Supreme Court of the United States on jurisdictional grounds only, A. F. of L. v. Watson, 327 U. S. 582, 90 L. Ed. 873).

In the field of federal legislation the principles set forth in the Amendment under consideration have been adopted in several instances. The Railway Labor Act, 45 U. S. C. A., section 152, Fifth, provides that:

> "Agreements to join or not to join labor organizations forbidden. Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees, by an appropriate order that such contract has been discarded and is no longer binding on them in any way."

The United States Supreme Court had occasion to review this legislation and sustained it. Virginian R. Co. v. System Fed. R. E. D., 300 U. S. 515, 81 L. Ed. 789; Texas & N. O. R. Co. v. Brotherhoods, etc., 281 U. S. 548, 74 L. Ed. 1034. Again, the Federal Bankruptcy Act of 1933 (47 Stat. 1481, sec. 77(p), (q)), prohibits a trustee in bankruptcy from entering into a closed-shop agreement with a union covering employment in any enterprise for which he is acting as trustee. And, finally, Title 1, Section 14 (b) of the Taft-Hartley Act, amending the National Labor Relations Act specifically recognizes the right of states to pass such legislation, and appropriately restricts the use of federal law when such occurs by stating:

> [fol. 128] "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

In view of the great number of states which have seen fit to consider such legislation an appropriate and necessary

7. Motion to Dismiss by American Sash & Door Co. and W. B. Stevens.

8. Memorandum of Opinion and Order denying motions to strike and motion to dismiss for lack of capacity of parties and misjoinder.

9. Order Granting Motion to Dismiss for failure to state a claim upon which relief could be granted.

10. Judgment.

11. Notice of Appeal.

12. Appeal Bond Receipt and Memorandum.

13. Request and Order directing original papers to be sent to Supreme Court on appeal.

14. Appellants' Designation of Record and Proceedings to be contained in record on appeal.

15. Minute Entries.

16. Exhibit A to Complaint (in envelope inside back cover).

17. Appellants' Assignments of Error as set forth on pages 11-13 of their brief.

18. Decision of the Arizona Supreme Court.

19. Judgment of the Arizona Supreme Court.

20. Petition for Allowance of Appeal.

21. Assignment of Errors.

22. Statement of Jurisdiction.

23. Service of Appeal Papers and Statement Directing Attention to Par. 3, Rule 12.

24. Bond on Appeal.

25. Proof of Service of Papers required by Rule 12.

26. Order allowing Appeal.

27. Citation to Appellees.

28. Return on Citation to Appellees.

[fol. 155] 29. Stipulation for transcript of record.

30. Clerk's Certificate.

Respectfully submitted, J. H. Morgan, 425 Luhrs Building, Phoenix, Arizona; H. S. McCluskey, 926 E. McDowell Road, Phoenix, Arizona; J. Albert Woll, Herbert S. Thatcher, James A. Glenn, 736 Bowen Building, Washington 5, D. C., Counsel for Petitioners.

Dated this 18th day of February, 1948.

Agreed to by Evo DeConcini, Attorney General, by Perry M. Ling, Chief Asst. Att. Gen'l. Moeur & Moeur, By W. A. Moeur. Jennings, Strouss, Salmon & Trask, by Charles L. Strouss.

[illegible] In the [illegible] of [illegible]

[illegible]

[illegible]

[

exercise of the police power, and in view of the recognition given by the federal government both to the principles contained in such legislation and the right of states to adopt such, it might well be presumptuous of this court, in applying the test for such legislation set down by the Supreme Court of the United States, to find our Amendment "palpably in excess of legislative power", "without rational basis", and to hold that "on no reasonable theory could it contribute to the public health, safety or welfare". We find ourselves in agreement with the following statement of Associate Justice Seawell, writing for the Supreme Court of North Carolina in the decision which sustained the constitutionality of a similar act (State v. Whitaker, supra):

> "* * * Great weight must be attached to the fact that so many separate jurisdictions have, within a short space of time, seen fit to exercise their police power in the same manner and for the same purposes. The composite will of such a broad cross section of our country cannot be lightly discarded as unreasonable, arbitrary or capricious or lacking in substantial relationship to its objective. * * *"

And, to the same effect but concerning a different sort of police power legislation, Chief Justice Hughes in West Coast Hotel Co. v. Parrish, supra, said:

> "* * * The adoption of similar requirements by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."

Freedom of Speech and Assembly.

Appellants' third assignment of error and third proposition of law are devoted to the contention that "the amendment impairs and previously restrains the exercise of the [fol. 129] civil rights of assembly and speech guaranteed under the First Amendment, and as protected against state invasion by the Fourteenth Amendment", and they claim that for this reason the court erred in dismissing the complaint and rendering judgment for appellees. Appellants

[illegible]

[illegible]

[illegible]

> * * * on the contrary, it seems to us that a labor [illegible] may serve to secure the rights of free speech and assembly to all persons concerned. The statute protects the * * * right of workmen to express their individual opinions by refraining to join unions. The right of either side, or any faction of any side, to a labor controversy to assemble and publicize its own ideas [illegible] State v. Whitaker, supra

Was the foregoing measure so build that the Amendment in section 6 violates the constitutional rights of freedom of speech or assembly.

Prospective and Retrospective Operation

Holding as we do that the Amendment is constitutional, there remains to be decided only the question of whether it applies to contracts existing at the effective date of the Act. Appellants, as their fourth assignment of error, charge that the trial court improperly held the Amendment to void such contracts. And a part of their fourth proposition of law states:

> "Constitutional, like statutory provisions are construed to operate prospectively only, unless on the face of the measure the contrary intention is clearly manifested. * * *"

The above quoted portion of the fourth proposition of law is entirely sound and correct. 11 Am. Jur., Constitutional Law, section 75; 16 C. J. S., Constitutional Law, section 256a; City of Shreveport v. Cole, 129 U. S. 36, 32 L. Ed. 589. It is difficult, however, to understand appellants' attempted application of this rule of law to the case at bar. The Amendment in question provides that from and after its effective date "No person shall be denied the opportunity to obtain or retain employment * * * (etc.) or [ibid. 122] any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment. * * * (etc.)". The latter clause specifically prevents future contracts of a kind inimical to the Amendment, while the former clause grants immediately to persons concerned the protection the Amendment affords. As has been previously shown, there is reserved to the state the right to regulate and control contracts, and the Constitution and laws of the state are a part of such contract. Home Bldg. & Loan Ass'n v. Blaisdell, supra. The effect of appellants' argument is that persons by making contracts extending into the future may prevent the exercise of the police power by the state. The agreements in the record extend year after year unless terminated by thirty days' notice at the end of an annual period. It must be remembered that a statute is not retrospective from the mere fact that it relates to antecedent facts. Cox v. Hart,

30 U. S. 427, 67 L. Ed. 332; State v. Martin, 59 Ariz. 438, 130 P. 2d 48. Under appellants' theory, although these agreements are found by the voters to be injurious to the public health, safety, and welfare they are immune from the exercise of the police power if executed before the police power is exercised. The gist of such argument is that rights under a contract are, under the Constitution, more sacred than the public health, safety, and welfare. A mere statement of the proposition demonstrates its absurdity.

Conclusion

In conclusion we find that the right to contract may be abridged by proper exercise of the state's police power without violating the Federal Constitution. The yardstick by which we must judge whether our Amendment constitutes such proper exercise of the police power highly confines and limits the scope of our inquiry. We may not pass on the wisdom, the practicability, or the desirability of such legislation. We must look to see only that it has some rational basis; is supportable on some reasonable theory; is not capricious, arbitrary, or discriminatory. We must further [fol. 133] guide our view by a strong presumption of validity in favor of such legislation, putting the burden upon those who attack it. Nor does this limited a review by the courts seem untoward. In the last analysis it should be and is the prerogative of the people to determine and experiment with their own social and economic legislation and for the courts merely to see that they do not get "out of bounds" and that they remain within the framework of our government by staying within the limits of the Constitution. No less an authority than Professor Charles O. Gregory, former counsel to the U. S. Department of Labor and one of the nation's foremost scholars and champions of the labor movement, has this to say on the subject of the validity of legislation such as is here before us:

> "* * * if a majority of (the voters) see fit to conclude that the closed or union shop be made unlawful in their state, that is their business. And it is hard to see on what grounds such legislation could possibly be overturned as unconstitutional." Gregory, Labor and the Law, Norton & Co., 1st Ed., 1946, page 115.

A consideration of all these fundamental concepts impels the conclusion that this Amendment to the Arizona Consti-

tution, when measured by the yardstick fashioned for us by the United States Supreme Court, does not contravene any provisions of the federal organic law. We cannot say that it does not have a rational basis or could not on some reasonable theory contribute to the public welfare, where, as here, it is addressed to a legitimate end and the measures taken are considered by the voters reasonable and appropriate to that end. The rights of free speech and assembly remain inviolate. Labor's basic rights to organize into a union, bargain collectively, to strike, and peaceably picket are not abridged. Those things being established, the wisdom and propriety of the legislative action is not for the determination of the courts, but is a matter for the determination of the people of this sovereign state upon whom the duty and responsibility of decision rests. There is then both the force of logic and the recognition and will of the [fol. 134] people of Arizona that this is necessary and proper legislation. Together with this, there is a similar recognition on the part of the people of fifteen other states and the Federal Government that this is a desirable and proper use of the police power directed toward an appropriate legislative purpose. There can be no valid argument made that such legislation is discriminatory or that its effect upon existing contracts should be limited.

Judgment affirmed.

Levi S. Udall, Justice.

Concurring: Arthur T. LaPrade, Justice.

[fol. 135] OPINION

Stanford, C. J., dissenting in part:

I favor the majority opinion in upholding the following portion of the Amendment:

> "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, * * *."

I agree with the statement of law made by Justice Hughes in the case of Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. Rep. 7, wherein he said:

> "* * * It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the per-

sonal freedom and opportunity that it was the purpose of the Amendment to secure. * * *"

The second portion of the Amendment is unconstitutional, for the constitution prohibits the impairment of contracts, but the majority opinion approves and upholds it on the grounds of the state's police power. On that subject from the case of Treigle v. Acme Homestead Asso., 297 U. S. 189, 80 L. Ed. 575, I quote:

> "Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

Also from the case of Home Building & Loan Asso. v. Blaisdell, 290 U. S. 398, 78 L. Ed. 413, I quote:

> "* * * the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions."

I think that to exercise the police power in support of the second portion of this Amendment is arbitrary and oppressive, and I accordingly dissent.

R. C. Stanford, Chief Justice.

[fol. 136] [File endorsement omitted]

IN THE SUPREME COURT OF ARIZONA

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 16, 1948

To the Honorable R. C. Stanford, Chief Justice of the Supreme Court of the State of Arizona:

Your petitioners, American Federation of Labor, Arizona State Federation of Labor, Phoenix Building and Construction Trades Council, United Brotherhood of Carpenters

and Joiners of America, Millmen, Cabinet Makers and Lumber Handlers Union No. 2563, Forest L. Stiers, individually and as President of Local Union No. 2563, and Ralph Henley, d.b.a. Ralph Henley Millwork, respectfully show:

1. The petitioners are various labor organizations functioning in the State of Arizona and particularly in the City of Phoenix, one individual member and officer of one of such organizations, and an individual employer engaged in the manufacture of wood products in the City of Phoenix. On February 12, 1947, petitioners filed a complaint in the [fol. 137] Superior Court of Maricopa County seeking a declaratory judgment and equitable relief in respect to the application or attempted application as against them of an amendment to the Constitution of the State of Arizona, adopted in November of 1946 and commonly referred to as the "Right-to-Work or Anti-Closed-Shop" Amendment. Such Amendment purported to outlaw all existing and future closed-shop or union-security agreements or other type of agreement requiring membership in a labor organization as a condition of employment. The complaint named as defendants two employers, three individuals discharged under union-shop agreements, and the Attorney General of the State. The complaint alleged that the Amendment, as applied to the plaintiffs in respect to specific situations, was contrary to the Federal Constitution.

2. The defendants moved to dismiss the complaint on the ground that, since the Amendment was constitutional, the complaint stated no cause of action. The trial court granted such motion to dismiss for such reason.

3. The petitioners thereupon appealed to this Court from the judgment granting the motion to dismiss the complaint, and on February 4, 1948, this Court entered a decision and judgment affirming the judgment below. This Court is the highest court of Arizona in which a decision in this suit can be had, and this Court's decision and decree in this cause is final.

4. In this cause there was drawn in question the validity of the so-called "Right-to-Work or Anti-Closed-Shop" Amendment to the Arizona Constitution, adopted in 1946, on the ground that said Amendment was repugnant to the Constitution and Laws of the United States, and the decision

of this Court was in favor of the validity of such Amendment, notwithstanding your petitioners' contention, made both before the trial court and this Court, that the said Amendment violated the First and Fourteenth Amendments to the United States Constitution and Article I, Section 10, thereof.

[fol. 138] 5. The errors upon which your petitioners claim to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States, which statement demonstrates that the federal questions are substantial and that the issues are of sufficient importance to warrant, indeed to require, consideration and determination by the Supreme Court of the United States.

Wherefore, your petitioners pray for the allowance of an appeal from the said Supreme Court of the State of Arizona, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and judgment or decree of the said Supreme Court of the State of Arizona may be examined and reversed, and also pray that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Arizona, under his hand and seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioners; and that [fol. 139] the bond for costs tendered by the petitioners be approved.

J. H. Morgan, 425 Luhrs Building, Phoenix, Arizona; H. S. McCluskey, 926 E. McDowell Road, Phoenix, Arizona; J. Albert Woll, Herbert S. Thatcher, James A. Glenn, 736 Bowen Building, Washington 5, D. C., Counsel for Petitioners.

Dated this 16th day of February, 1948.

[fol. 140] [File endorsement omitted]

IN THE SUPREME COURT OF ARIZONA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed February 16, 1948

Come now the above named appellants, and as appellants to the Supreme Court of the United States from the decision and judgment or decree heretofore entered herein, assign as error the following:

1. The Supreme Court of the State of Arizona erred in failing to hold that the so-called "Right-to-Work or Anti-Closed-Shop" Amendment, by forbidding appellants under any and all circumstances to enter into any type of union-security agreement and by denying the union appellants their only proven and practical method of protecting their standards, stabilizing their gains, and obtaining an adequate share of the joint product of capital and labor, among other things, deprived such appellants of rights, liberties [fol. 141] and freedoms protected under the Fourteenth Amendment to the United States Constitution, and in failing to hold that such absolute and unconditional proscriptions against entering into union-security agreements contained in the "Right-to-Work or Anti-Closed-Shop" Amendment were arbitrary, unreasonable, excessive and without rational basis.

2. The Supreme Court of the State of Arizona erred in failing to hold that said "Right-to-Work or Anti-Closed-Shop" Amendment arbitrarily and unreasonably impaired the obligations of contracts entered into prior to the adoption of the said Amendment, to which contracts several of the appellants were parties, all in violation of Article I, Section 10, of the United States Constitution.

3. The Supreme Court of the State of Arizona erred in failing to hold that said "Right-to-Work or Anti-Closed-Shop" Amendment, by favoring non-union workers over union workers, and by permitting employers to retain all their traditional methods of consolidating gains against competition of other employers and against demands of organized labor, while denying to union members their one method of improving their conditions and consolidating their gains against the competition of non-union workers

and against the competition of employers for a fair share in the national income, all without providing an adequate substitute method, deprived the union appellants of the equal protection of the law, contrary to the Fourteenth Amendment to the United States Constitution.

4. The Supreme Court of the State of Arizona erred in failing to hold that said "Right-to-Work or Anti-Closed-Shop" Amendment, by outlawing the union-security agreement, and thus imperiling the very existence of labor [fol. 142] organizations and their ability adequately to function in the interests of working people, restrained the union appellants in the exercise of fundamental rights of working people protected as a concomitant of the rights of speech and assembly under the First Amendment, and protected against invasion by the State under the Fourteenth Amendment.

5. The Supreme Court of the State of Arizona erred in holding that the said "Right-to-Work or Anti-Closed-Shop" Amendment is constitutional, valid and enforceable, both on its face and as applied in the present case, under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 10, thereof; in failing to hold to the contrary; in affirming the judgment of the trial court dismissing appellants' complaint; and in failing to grant the relief requested.

Wherefore, on account of the errors hereinbefore assigned, petitioners pray that the said decision and decree of judgment of the Supreme Court of the State of Arizona, dated the 4th day of February, 1948, in the above entitled cause be reversed and judgment entered in favor of these appellants.

J. H. Morgan, 425 Luhrs Building, Phoenix, Arizona; H. S. McCluskey, 926 E. McDowell Road, Phoenix, Arizona; J. Albert Woll, Herbert S. Thatcher, James A. Glenn, 736 Bowen Building, Washington 5, D. C., Counsel for Petitioners.

Dated this 16th day of February, 1948.

[fols. 143-145] Bond on appeal for $1,000, approved and filed Feb. 17, 1948, omitted in printing.

[fol. 146] [File endorsement omitted]

IN THE SUPREME COURT OF ARIZONA

[Title omitted]

PROOF OF SERVICE—Filed February 17, 1948

STATE OF ARIZONA,
County of Maricopa, ss:

J. H. Morgan, one of the attorneys for appellants in the above entitled action, being first duly sworn, deposes and says:

That on the 17th day of February, 1948, at Phoenix, Arizona, he personally served Evo de Concini, Attorney General of the State of Arizona, Messrs. Moeur & Moeur, and Messrs. Jennings, Strouss, Salmon & Trask, Attorneys for the Appellees in the above entitled action, true and correct [fol. 147] copies of the following papers and documents in connection with the appeal from the judgment of the Supreme Court of Arizona in the above entitled action, to-wit:

1. A copy of the Petition for Allowance of Appeal;

2. A copy of the Assignments of Error;

3. A copy of the Statement as to Jurisdiction;

4. A copy of Order allowing Appeal, signed by Chief Justice R. C. Stanford of the Supreme Court of Arizona, on February 16, 1948;

5. Copy of Citation signed by the Chief Justice and Clerk of the Supreme Court on February 16, 1948;

All of the foregoing papers, with the exception of the Citation, having been filed with the Clerk of said Supreme Court on the 16th day of February, 1948; and the original citation being returned herewith;

6. Statement directing attention to Par. 3 of Rule 12 of the Rules of the Supreme Court of the United States, the original of which is being filed with the Clerk of said Court on this date;

7. Copy of Bond filed with the Clerk of said Supreme Court and approved by the Chief Justice on February 17, 1948.

J. H. Morgan.

Subscribed and sworn to before me this 17th day of February, 1948. Kitty C. Aitken, Notary Public. My Commission expires March 14, 1951. (Notarial Seal.)

[fol. 148] [File endorsement omitted].

IN THE SUPREME COURT OF ARIZONA

[Title omitted]

ORDER ALLOWING APPEAL—Filed February 16, 1948

The petition of American Federation of Labor, Arizona State Federation of Labor, Phoenix Building and Construction Trades Council, United Brotherhood of Carpenters and Joiners of America, Millmen, Cabinet Makers and Lumber Handlers Union No. 2093, Forest L. Stiers, individually and as President of Local Union No. 2093, and Ralph Henley, d.b.a. Ralph Henley Millwork, the appellants in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the decision and decree of the Supreme Court of the State of Arizona, having been filed with the Clerk of this Court and presented herein, accompanied by assignments of error and statement as to jurisdiction, all as provided by Rule 46 of [fol. 149] the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final decision and decree, dated the 4th day of February, 1948, of the Supreme Court of the State of Arizona, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Arizona shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall

be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered and that the said appellants shall give a good and sufficient bond for costs in the sum of One Thousand Dollars, and that appellants shall prosecute said appeal to effect and answer all costs if they fail to make their plea good.

R. C. Stanford, Chief Justice of the Supreme Court of the State of Arizona.

Dated this 16th day of February, 1948.

[fols. 150-152] Citation in usual form showing service on Perry M. Ling, et al., filed Feb. 17, 1948, omitted in printing.

[fol. 153] [File endorsement omitted]

IN THE SUPREME COURT OF ARIZONA

[Title omitted]

STIPULATION FOR TRANSCRIPT OF RECORD—Filed February 18, 1948

To the Clerk of the Supreme Court of the State of Arizona:

Kindly prepare for transmittal to the Supreme Court of the United States a true copy of the entire record in this case, both as on appeal to this Court and to the Supreme Court of the United States, and including the decision and decree or judgment of the Supreme Court of the State of Arizona. More specifically, such record shall include the following:

1. Complaint.
2. Motion to Strike by Attorney General.
3. Motions to Strike by other Defendants.
4. Motion to Dismiss by Attorney General.

[fol. 154] 5. Motion to Dismiss by American Sash & Door Co. and W. B. Stevens.

6. Motion to Dismiss by D. A. Brewer and Edward L. Beard.

the trial court made and entered in said cause be affirmed. Costs in this court to appellees of and from said appellants as principals on their cash bond on appeal filed in the case.

[fols. 157-159] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 160] IN THE SUPREME COURT OF THE UNITED STATES

APPELLANTS' STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed February 26, 1948

Comes now the appellants and adopt their assignments of error as their statement of the points to be relied upon, and represent that the whole of the record, as filed, is necessary for the consideration of the case.

J. Albert Woll, Herbert S. Thatcher, James A. Glenn, 736 Bowen Building, Washington 5, D. C.; J. H. Morgan, 425 Luhrs Building, Phoenix, Arizona, Counsel for Appellants.

Dated this 26th day of February, 1948.

[fol. 160a] [File endorsement omitted.]

[fol. 161] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—March 29, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 52,856. Arizona Supreme Court. Term No. 626. American Federation of Labor, Arizona State Federation of Labor, Phoenix Building and Construction Trades Council, et al., Appellants, vs. American Sash & Door Company, D. A. Brewer, W. B. Stevens, et al. Filed February 25, 1948. Term No. 626, O. T. 1947.

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1947~~ 1948

~~No. 575~~ 27

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL., *Appellants,*

vs.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

STATEMENT AS TO JURISDICTION

J. ALBERT WOLL,
HERBERT S. THATCHER,
JAMES A. GLENN,
J. H. MORGAN,
H. S. MCCLUSKEY,
Counsel for Appellants.

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SUPREME COURT OF THE STATE OF ARIZONA

No. 5028

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, MILLMEN, CABINET MAKERS AND LUMBER HANDLERS UNION NO. 2093, FOREST L. STIERS, INDIVIDUALLY AND AS PRESIDENT OF LOCAL UNION NO. 2093, AND RALPH HENLEY, D.B.A. RALPH HENLEY MILLWORK,

Appellants,

vs.

AMERICAN SASH & DOOR COMPANY, A CORPORATION; D. A. BREWER, W. B. STEVENS, EDWARD L. BEARD, JAMES R. MILLER, AND JOHN L. SULLIVAN, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF ARIZONA, (SUCCEEDED BY EVO DE CONCINI AS ATTORNEY GENERAL, WHO HAS BEEN SUBSTITUTED AS A PARTY DEFENDANT),

Appellees

STATEMENT IN SUPPORT OF JURISDICTION

Appellants, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled case on appeal, respectfully show:

A

Statutory Provisions Sustaining Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States in this appeal is Section 237(a) of the Judicial Code as amended, 28 U. S. C. A. 344(a).

The present case involves a final judgment in the highest court of the State of Arizona where there was drawn in question the validity of a law of that State, namely, the so-called "Right-to-Work or Anti-Closed-Shop" Amendment to the Arizona Constitution, on the grounds of its being repugnant to the United States Constitution, and the decision of that Court was in favor of the validity of such law. Under such circumstances, Section 237(a) permits appeal to the United States Supreme Court.

B

The Statute of the State the Validity of Which Is Involved

The statute of the State of Arizona the validity of which was affirmed by the Arizona Supreme Court, and which is involved in this appeal, is the so-called "Right-to-Work or Anti-Closed-Shop" Amendment. This Amendment reads as follows:

> "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the State or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization."

C

Date of Decision and Judgment or Decree and of Application for Appeal

The decision and judgment or decree of the Supreme Court of the State of Arizona, now sought to be reviewed, was rendered on February 4, 1948. The date on which the petition for appeal was presented was February 16th, 1948.

D

Nature of Case and Existence of Federal Questions

Appellants are the appellants in the above entitled case and plaintiffs before the trial court. Appellant American Federation of Labor is a voluntary unincorporated association of national and international unions and appears in this proceeding in a representative capacity. Appellant Arizona State Federation of Labor is a voluntary unincorporated association of labor organizations affiliated with the American Federation of Labor and functioning within the State of Arizona. Appellant Phoenix Building and Construction Trades Council is a voluntary unincorporated association of craft unions affiliated with the American Federation of Labor and functioning in the building and construction industry in the City of Phoenix, Arizona. Appellant United Brotherhood of Carpenters and Joiners of America, A. F. L., is an international craft union of persons employed in the carpentry trade. Appellant Millmen, Cabinet Makers and Lumber Handlers Union No. 2093 is a local union affiliated with the United Brotherhood of Carpenters and Joiners of America, taking into membership employees in the wood milling and cabinet making trades in the City of Phoenix. Appellant Forest L. Stiers is a member and president of such Local 2093 and is employed by the re-

spondent American Sash & Door Company. Appellant Ralph Henley is an individual engaged in the manufacture of sash, doors and fixtures in the City of Phoenix and doing business under the name of Ralph Henley Millwork.

On February 12, 1947, appellants filed a complaint as plaintiffs in the Superior Court of Maricopa County, seeking a declaratory judgment and equitable relief in respect to the application or attempted application as against them of an amendment to the Constitution of the State of Arizona, adopted in November of 1946 and commonly referred to as the "Right-to-Work or Anti-Closed-Shop" Amendment. Such Amendment purported to outlaw all existing and future closed-shop or union-security agreements or other type of agreement requiring membership in a labor organization as a condition of employment. It reads as follows:

> "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the State or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization."

The defendants named in the complaint were two employers, three individuals discharged under union-shop agreements, and the State Attorney General. These are the appellees herein.

The complaint alleged that the Amendment, as applied, and as attempted to be applied, to the plaintiffs in respect to specific existing controversies, was invalid as contrary to the federal Constitution. The defendants moved to dismiss the complaint, thus admitting all of the factual allegations. Such allegations indicate the following factual

situations to exist in respect to which the Amendment was being applied to plaintiffs' irreparable injury.

1. Prior to the adoption of the Amendment, plaintiff Local Union No. 2093 entered into a contract requiring membership as a condition of employment with defendant employer American Sash & Door Company, as did also plaintiff Phoenix Building and Construction Trades Council and defendant employer D. E. Brewer. At a date subsequent to the Amendment, one employee of each of said employers wilfully defaulted in dues, and lost their membership in their unions. The respective unions requested such employers to discharge such employee pursuant to the union-security clause, but the employer refused to do so solely because of the existence of the Anti-Closed-Shop Amendment and because of threats, both by the Attorney General of the State and by the individuals whose discharge was requested, to institute civil and criminal prosecutions for violation of the Amendment.

2. Subsequent to the effective date of the Amendment, plaintiff employer Ralph Henley and plaintiff Local Union No. 2093 entered into an agreement which, among other things, required membership in the union as a condition of employment. A member of the union employed by Henley wilfully defaulted in dues, and lost his membership in the union. The union requested such employer to discharge the employee pursuant to the union-security clause, but the employer, although otherwise willing, refused to do so because of the existence of the Anti-Closed-Shop Amendment and because of threats, both by the Attorney General of the State and by the union member whose discharge was requested to institute civil and criminal prosecutions for violation of the Amendment,

3. Plaintiff Arizona State Federation of Labor had for many years published and distributed a labor newspaper on

behalf of the labor movement. It customarily employed only union members. Subsequent to the effective date of the Amendment, it denied employment to an applicant upon the sole grounds that he was not a member of a labor organization. The Attorney General of the State thereupon threatened to institute civil and criminal prosecutions against such plaintiff.

4. The Attorney General of the State has made repeated threats to all the plaintiffs and to other labor organizations and employers similarly situated that he would immediately bring civil and criminal prosecutions if there were any violations of the law, as by attempting to make or by making any type of union-security agreement, or by enforcing any union-security agreement.

The plaintiffs alleged that the Amendment in question was unconstitutional and void for the following reasons: (a) the Amendment impaired the obligations of existing contracts in violation of Article I, Section 10, of the United States Constitution; (b) the Amendment arbitrarily and unreasonably deprived plaintiffs of fundamental rights, liberties and freedoms protected under the Fourteenth Amendment to the United States Constitution; (c) the Amendment deprived the union plaintiffs of fundamental rights and freedoms guaranteed under the First Amendment as a concomitant of the right of assembly and speech and protected against invasion by the State under the Fourteenth Amendment; and (d) the Amendment denied the union plaintiffs equal protection of the laws contrary to the Fourteenth Amendment.

Plaintiffs sought the following relief in their complaint: (a) an injunction in the nature of a decree for a specific performance requiring the respective employers to fulfill their obligations under their contracts; (b) injunctive relief against the Attorney General and his agents, restraining

them from enforcing or threatening to enforce the Anti-Closed-Shop Amendment; and (c) a declaratory judgment setting forth the rights and duties of the parties under their existing agreement and under the Amendment.

The trial court granted the defendants' motions to dismiss on the ground that, since the Amendment was constitutional, no cause of action was stated. It considered and denied each of the plaintiffs' contentions respecting the invalidity of the Amendment under the federal Constitution.

The plaintiffs then appealed to the Supreme Court of the State of Arizona, assigning as error the action of the trial court in refusing to sustain plaintiffs' contention that the Amendment was unconstitutional in the various respects as set forth in the complaint and in refusing to grant the relief prayed. Pursuant to their appeal to the Supreme Court of the State of Arizona, plaintiffs briefed and argued the specific questions under the federal Constitution that were raised before the trial court. Thus, it is evident that appellants raised the federal questions that are now being argued before the United States Supreme Court at every possible opportunity.

On February 4, 1948, the Supreme Court of the State of Arizona handed down its decision and judgment in which it considered each of the federal questions raised by the appellants, decided each of such questions adversely to appellants' contentions and affirmed the judgment below. One of the three justices dissented. A copy of such decision and dissent is attached hereto as "Exhibit A."

E

Substantiality of Questions Involved

Appellants respectfully represent that the questions involved in their appeal to the Supreme Court of the United States are of a substantial nature. That Court has many

times stated that an appeal will not be dismissed for want of a substantial federal question unless the contentions of the appellants are "clearly not debatable and utterly lacking in merit." *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258.

The precise issues involved in the present case, namely, the validity under the federal Constitution of an absolute prohibition of closed-shop or any other type of union-security agreements by the State, were presented to and accepted by the United States Supreme Court in *American Federation of Labor* v. *Watson*, 327 U. S. 582. While the Supreme Court remanded that case to the state court for clarification of the meaning and scope of the Florida anti-closed-shop law there involved, all the Justices indicated that the issues there presented were substantial and important ones fully warranting consideration and determination by the Court. In the present case the Arizona law has been considered and construed by the highest Court of Arizona, which Court has held in respect to such law as follows: (1) the law impairs the obligations of union-security agreements entered into prior to the effective date of the law; (2) the law prevents the making or enforcement of agreements subsequent to the effective date of the law; (3) the law prohibits any attempt by an employer to employ union members only, whether by formal agreement or otherwise; and (4) the law is enforceable by suit for injunction and suit for damages for violation thereof, and possibly by criminal prosecutions by the Attorney General.

The Arizona Anti-Closed-Shop Amendment involved herein has thus been authoritatively and finally construed completely to outlaw, not merely to condition or regulate, the making of union-security agreements in the State and the enforcement of such agreements entered into prior to the passage of the Amendment, so that the use of such

agreements is forbidden in the State under any and all circumstances and regardless of the desires of the parties involved or the inconsequential effect of any particular agreement upon the public health, safety and welfare. In his dissent in *Wallace Corporation* v. *National Labor Relations Board*, 323 U. S. 248, Justice Jackson quite aptly stated that "A closed shop is the ultimate goal of most union endeavor." The State of Arizona, without a public need therefor, and with no ascertainable public benefit, has arbitrarily decreed that this goal shall no longer be obtainable. One hundred and fifty years of trade union history and experience, and the record in this case, have clearly demonstrated that agreements requiring union membership as a condition of employment constitute the *only* proven and effective means for working people to obtain and insure (1) their collective security and the maintenance of their labor unions once organization is achieved; (2) an equality of bargaining power as a means of obtaining an adequate share of the joint product of capital and labor; and (3) the consolidation of gains achieved in collective bargaining and the protection of working standards through elimination of the cutthroat wage competition of non-union employees. Further, the union shop constitutes the sole means of achieving equality of sacrifice among employees by insuring that all who enjoy union wages and working conditions, obtained after years of struggle and deprivation, share in the cost of such benefits as members of the union rather than as "free riders." Not a few employers have found that such agreements result in stability of employment relationships, promotion of harmony and cooperation between employers and employees, and the elimination of jurisdictional strife and discord both in the plant and between rival labor organizations, and are an effective means of increasing production by eliminating sus-

picion and hostility, and freeing union energies and resource for constructive cooperation rather than defensive sparring.

Whether the State can constitutionally outlaw all union-security agreements is, therefore, a matter of gravest importance to the fifteen million members of organized labor in this country, as well as to an increasingly large number of employers throughout the Nation. As seen from a recent bulletin issued by the Department of Labor (Plaintiffs' "Exhibit A" attached to complaint in Record), almost 75% of the employees in all major industries now working under collective agreements are covered by union-security clauses. A decision by the United States Supreme Court is vitally necessary to remove the confusion and disruption occasioned by the law in question, and by similar laws passed in some eleven other States. It is respectfully submitted that the issue is one fully warranting consideration by the Supreme Court of the United States.

It is appellants' contention that, taking into consideration the traditional and important function of union-security agreements in our modern industrial society and, above all, their indispensability to the adequate and efficient functioning of the trade union movement of this country, the absolute prohibition of the union-security principle without equivalent substitute (such as might be found in state control as under the Railway Labor Act, or in compulsory arbitration), attempted under the Arizona law, is arbitrary, excessive and without rational basis or justification either in the correction of any existing or cognizable abuses or in the protection of any public interest. Further, the law operates discriminatorily against organized workers and in favor both of employers and non-union employees in respect to the efforts and abilities of such classes of persons to achieve and maintain an adequate share in the national income. Economic, sociological and other factual ma-

terial, either as contained in the record or concerning which the Court can take judicial notice, is available in support of these contentions and have been presented to the Arizona Supreme Court and will be presented to the Supreme Court of the United States both in a principal brief and in an economic brief. Such material demonstrates that the prohibitions of the Arizona law exceed the permissible range of police power as prescribed in such cases as *Nebbia* v. *New York*, 291 U. S. 502; *West Coast Hotel* v. *Parrish*, 300 U. S. 379; *Home Building & Loan* v. *Blaisdell*, 290 U. S. 398, and *Treigle* v. *Acme Homestead Association*, 297 U. S. 189. Further, it can be convincingly demonstrated that the legislation in question, providing as it does for complete prohibition rather than regulation of the institution of union security, and the total deprivation rather than conditioning, of constitutionally protected rights, is excessive and arbitrary under the doctrine of such cases as *Adams* v. *Tanner*, 244 U. S. 590; *D. E. Weaver* v. *Palmer Brothers Co.*, 270 U. S. 402; and *Liggett* v. *Baldridge*, 278 U. S. 105, regulation being amply sufficient to correct any possible abuses. As stated in the *Adams* case,

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Further, appellants assert impairment of rights of a more fundamental nature, entitled to greater protection under the Constitution than any right of property or contract. Union security goes to the very existence of labor organizations and their ability adequately to function on behalf of their members; the abolition of that institution, without any equivalent substitute, seriously impairs, if it does not render completely ineffective,[1] the right of organization itself, upheld as a fundamental right in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, and found to comprise a concomitant of the right of assembly and speech in *Thomas* v. *Collins*, 323 U. S. 516. Since essential civil and personal rights are involved, a stricter test than that of possible rational basis is required. "The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." (*West Virginia* v. *Barnette*, 319 U. S. 624.) "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." (*Thornhill* v. *Alabama*, 310 U. S. 88.)

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[1] As stated by the Supreme Court of Illinois in *Kemp* v. *Division 241*, 255 Ill. 213, 99 N.E. 389,

> ". . . to deny them the right to determine whether their best interests required that they should be associated in their work only with members of their organization would imperil their very existence."

The cases cited in the foregoing discussion involve appeals from determinations of state courts wherein the validity of state laws under the First and Fourteenth Amendments to the Constitution and under Article I, Section 10, thereof, was contested; those cases, accordingly, are authority supporting the jurisdiction of the Supreme Court of the United States over the present question where similar constitutional issues have been raised and decided adversely by the Supreme Court of the State of Arizona.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 344(a) of Title 28 of the U. S. Code.

Respectfully submitted,

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Dated this 16th day of February, 1948.

EXHIBIT "A"

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 5028

AMERICAN FEDERATION OF LABOR; ARIZONA STATE FEDERATION OF LABOR; PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; MILLMEN, CABINET MAKERS AND LUMBER HANDLERS UNION No. 2093; FOREST L. STIERS, individually and as President of LOCAL UNION No. 2093, and RALPH HENLEY, d.b.a. RALPH HENLEY MILLWORK, *Appellants*,

vs.

AMERICAN SASH & DOOR COMPANY, a Corporation; D. A. BREWER, W. B. STEVENS; EDWARD L. BEARD; JAMES R. MILLER, and JOHN L. SULLIVAN, individually and as Attorney General of the State of Arizona (succeeded by EVO DE CONCINI as Attorney General who has been substituted as a party defendant), *Appellees*.

Appeal from Superior Court of Maricopa County

Honorable M. T. Phelps, Judge

Judgment Affirmed

J. H. Morgan and H. S. McCluskey, of Phoenix; Herbert S. Thatcher, of Washington, D. C.; Minne & Sorensen, and George Wilson, of Counsel, of Phoenix, Attorneys for Appellants.

John L. Sullivan, Attorney General; John W. Rood, Chief Asst. Atty. Genl.; Moeur & Moeur; Jennings, Strouss, Salmon & Trask; J. A. Riggins, Jr.; Henry S. Stevens; Burr Sutter, all of Phoenix, Attorneys for Appellees.

UDALL, *J.*:

This appeal involves a determination of the constitutionality of what has been commonly styled the "Right to

Work" Amendment to the Arizona Constitution. For reasons which will be later developed, we have neither the duty nor the right to consider or judge the wisdom of this legislation or its practicability. Our function is limited to finding whether it offends the Constitution of the United States. The people of the State of Arizona at the general election held in 1946 adopted an Amendment to the Constitution of the State of Arizona, reading as follows:

> "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the state, or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization." (Petition and Governor's Proclamation validating it appear in 1947 Session Laws of Arizona at page 399.)

The Amendment (and as such it will hereafter be designated) became effective upon proclamation by the Governor dated November 25, 1946. On February 12, 1947, the appellants (plaintiffs below), as representatives of one segment of labor, filed this civil action to procure a declaratory judgment (under Article 7, Chapter 27, A. C. A. 1939) in respect to its validity, interpretation and effect, and for injunctive relief against its enforcement.

The trial court, while denying motions of appellees (defendants below) to strike portions or all of the forty-page complaint, commented that "far more than half of the complaint is wholly immaterial and irrelevant" but it granted their motion to dismiss the complaint. Appellants having elected to stand thereon, judgment was entered dismissing the action, and from the order and judgment of dismissal this appeal was taken.

No testimony was taken in the court below, and we have properly before us no conclusions of law, but only the facts well pleaded in the complaint (and, therefore, impliedly admitted by appellees by their motion to dismiss), together

with such other matters of which we may take judicial notice.

Parties to Suit

The appellants are various national and local labor organizations affiliated with the American Federation of Labor and an employer and an employee, all of whom have entered into or desire to enter into union security agreements in Arizona. The appellees are: (1) The Attorney General of Arizona (the present incumbent Evo De Concini having been substituted for, and having adopted the same position as, his predecessor) who, as the chief law enforcement officer, it is alleged, had threatened to institute civil and criminal proceedings against all persons violating said Amendment; (2) various employers who are parties to union security agreements; and (3) individual employees whose employment status would be affected by reason of such agreements.

Issues

By appropriate assignments of error and propositions of law appellants challenge the Amendment as being either invalid and unconstitutional, or at least inoperative as to certain contracts, for the following reasons: (1) the Amendment arbitrarily and unreasonably impairs the obligations of existing contracts and deprives both unions and employers of freedom of contract, all in violation of Article 1, Section 10, of the United States Constitution and the due process clause of the Fourteenth Amendment. (2) The Amendment constitutes class legislation and is highly discriminatory, denying unions and union members the equal protection of the laws contrary to the Fourteenth Amendment. (3) The Amendment impairs and previously restrains the exercise of the civil rights of assembly and speech guaranteed under the First Amendment. (4) In the event the Amendment be held valid by this court, appellants contend that it does not apply to contracts now existing which were entered into previous to the effective date of its adoption.

In the court below appellants urged that the Amendment was invalid because it was in conflict with the Wagner Act. However, since passage by Congress of the Taft Hartley Act, they have, for obvious reasons, abandoned this ground in presenting the instant appeal.

Neither need we here determine whether said Amendment is self-executing as this was not advanced either in the assignments of error or in the arguments contained in the briefs. It is evident, at least, that the Eighteenth Legislature considered additional sanctions necessary because that body, in regular session assembled, enacted four measures (Senate Bills numbered 3, 65, 66, & 67) to implement it. Senate Bill No. 65 became a law (Chapter 81, Session Laws of Arizona, 1947, at page 173) with the Governor's approval on March 20, 1947. That law provides for injunctive relief and suits for damages for violations of the Amendment and also declares contracts prohibited by it to be illegal and void. No criminal penalties are prescribed. The other three measures (providing for conciliation of labor disputes, the enforcement by suits at law of collective bargaining agreements, and prohibiting secondary boycotts) never became law by reason of being vetoed by the Governor after adjournment of the legislature. These measures appear with other vetoed bills on pages 414 to 423 inclusive of the 1947 Session Laws.

The authority of the people of Arizona to amend their Constitution is unlimited except where prohibited by the Federal Constitution or in conflict with federal law enacted pursuant to constitutionally granted authority. However, an amendment has no greater validity and stands on no higher plane than legislative enactment insofar as being subject to attack for failure to square with the Federal Constitution. Miss. & Mo. R. R. Co. *v.* McClure, 10 Wall. 511, 19 L. Ed. 997; Denver *v.* New York Trust Co., 187 Fed. 890, 225 U. S. 707; New Orleans Water Works Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18, 31 L. Ed. 607.

Police Power

Counsel for appellees concede that justification for the Amendment in question must be found under what has been

judicially termed the "police power" of the state. There is, in the strict sense, no federal police power, A. F. of L. v. Watson, 60 F. Supp. 1010, because that is one of the powers impliedly reserved to the states by the Tenth Amendment. Justice Taney in License Cases, 5 Howard 504, 583, 12 L. Ed. 257, defined the police powers of a state as being "'nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions.'" This undefined power of government covering the health, safety, or welfare of the people bears the same relation to the state that the principle of self-defense bears to the individual.

The Question

Recognizing, then, that the liberty to, and right of, contract are not absolute and unyielding but are subject to being limited, restrained, and circumscribed in the interest of the state and the welfare of its people, the question here is: Was the police power of the state (by the people's adoption of the Constitutional Amendment here under review) so unreasonably, arbitrarily, or capriciously exercised as to be unconstitutional and therefore void?

Freedom to Contract—Due Process

Appellants' first assignment of error and proposition of law state, in effect, that the Amendment under consideration is unconstitutional: first, in that it violates that part of Article 1, Section 10 of the United States Constitution which says "No state shall . . . pass any . . . law impairing the obligation of contracts . . ."; and, second, in that it is also violative of that part of the Fourteenth Amendment which sets forth the proposition that "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

It is well settled that for certain proper purposes the state may limit the constitutionally guaranteed freedom to, and sanctity of, contract. Appropriate exercise of the state's police power; e.g., legislation in the interest of the public health, safety, and welfare, has been held to be such a pur-

pose. And relations between employer and employee have been recognized by the United States Supreme Court to be proper subjects for legislative regulation under the state's police power to legislate for the general welfare. Thornhill *v.* Alabama, 310 U. S. 88, 84 L. Ed. 1093; Carpenters etc. Union *v.* Ritter's Cafe, 315 U. S. 722, 86 L. Ed. 1143; West Coast Hotel Co. *v.* Parrish, 300 U. S. 379, 81 L. Ed. 703; 11 Am. Jur., Constitutional Law, section 345, and cases therein cited. It would serve no useful purpose to multiply authorities or extend this opinion with examples of such use of the police power.

There is no disagreement between the litigants that the Amendment under consideration is an attempted use of the police power; and as such it must stand or fall. The first task, then, is to determine by what standards a court should judge whether such power has been properly used. Both appellants and appellees direct our attention to, and rely for the most part upon, the standards for judgment set forth in three landmark decisions of the United States Supreme Court and one decision from this court. Nebbia *v.* New York, 291 U. S. 502, 78 L. Ed. 940; West Coast Hotel Co. *v.* Parrish, supra; Home Building & Loan Ass'n *v.* Blaisdell, 290 U. S. 398, 78 L. Ed. 413; State *v.* Childs, 32 Ariz. 222, 257 P. 366, 54 A.L.R. 736.

In the Nebbia case the question for decision was whether the New York statute fixing the minimum selling price for milk violated the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. The United States Supreme Court sustained the validity of the New York law stating in part:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that *the law shall not be unreasonable, arbitrary or capricious, and that the means selected*

shall have a real and substantial relation to the object sought to be attained. * * *"*

* * * * * * *

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a *reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied,* and judicial determination to that effect renders a court functus officio. * * * *With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal.* The courts of decision in this court exhibit a firm adherence to these principles. Times without number we have said that the *legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity,* and that though the court may hold views inconsistent with the wisdom of the law, *it may not be annulled unless palpably in excess of legislative power.*" (Emphasis supplied.)

In State *v.* Childs, supra, this court was faced with the question of whether a statute which required, among other things, that patent or proprietary drugs be sold only by registered pharmacists was a proper exercise of the police power to legislate for the public health and safety. In denying that it was a proper exercise of the power this court said:

"* * * *while every presumption is in favor of the validity of a statute, yet when it clearly appears that on no reasonable theory could such a one contribute to*

the public health or safety, it is the duty of the courts to so declare and to set it aside as unconstitutional, * * * (Citing cases.)"

* * * * * * *

"* * * This police power is, no doubt, a very broad one, and, within its legitimate sphere, a very useful one. It is wholly within the discretion of the Legislature when to exercise it, and to determine what are the best means to accomplish the desired object. *Courts will never assume to determine whether the law is a wise one, or whether the Legislature have adopted the best means.* Yet there is a limit to this power. A law enacted in the exercise of the police power must, in fact, be a police law. * * * It is, at least, settled that; *if it is apparent on the face of the act that its provisions, from their very nature, cannot and will not conduce to any legitimate police purpose, it is the right as well as the duty of the court to pronounce it invalid.* * * *." (Emphasis supplied.)

In West Coast Hotel Co. *v.* Parrish, supra, the Supreme Court upheld as a valid exercise of the police power a law of the State of Washington which authorized the fixing of minimum wages for women. In that case the court specifically reaffirmed its holding in the Nebbia case quoting much of the same language from it that we have here set out as the standard, test, or measure by which to judge whether the police power has been appropriately exercised.

In Home Building & Loan *v.* Blaisdell, supra, the Supreme Court upheld a Minnesota law extending the period of redemption in mortgage foreclosures as against the contention that such law impaired the obligation of existing mortgages. The court, after restating the proposition that proper police legislation may justify state regulation of contract rights, said:

"* * * The question is not whether the legislation affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate

end and the measures taken are reasonable and appropriate to that end. * * *"

Other pronouncements of the United States Supreme Court on the subject of the standard or test by which the validity of the exercise of police power is judged are as follows:

"* * * But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—*cannot be defined by any precise or universal formula.* Each instance of asserted conflict must be determined by itself, and it has been said many times that *each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation* and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation. *The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance.*" Erie R. Co. *v.* Williams, 233 U. S. 625, 58 L. Ed. 1155. (Emphasis supplied.)

"* * * Hence, in passing on the validity of present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. *Its function is only to determine whether it is possible to say that the legislative decision is without rational basis.* * * *" Clark *v.* Paul Gray, 306 U. S. 583, 83 L. Ed. 1001. (Emphasis supplied.)

See also: Florida C. & P. R. Co. *v.* Reynolds, 183 U. S. 471, 46 L. Ed. 283; Ex Parte McCardle, 7 Wall. 506, 19 L. Ed. 264; Soon Hing *v.* Crowley, 113 U. S. 703, 28 L. Ed. 1145; South Carolina State Highway Dept. *v.* Barnwell Bros., 303 U. S. 177, 82 L. Ed. 735; Stephenson *v.* Binford, 287 U. S.

251, 77 L. Ed. 288; Standard Oil Co. *v.* Marysville, 279 U. S. 582, 73 L. Ed. 857; Nashville, etc. Ry. Co. *v.* White, 278 U. S. 456, 73 L. Ed. 453; McLean *v.* Arkansas, 211 U. S. 539, 53 L. Ed. 315; Tanner *v.* Little, 240 U. S. 369, 60 L. Ed. 691; Chicago B. & Q. R. Co. *v.* McGuire, 219 U. S. 549, 55 L. Ed. 329; Arizona Copper Co. *v.* Hammer, 250 U. S. 400, 63 L. Ed. 1059; Gant *v.* Oklahoma City, 289 U. S. 98, 77 L. Ed. 1058; Bayside Fish Flour Co. *v.* Gentry, 297 U. S. 422, 80 L. Ed. 772.

Yardstick

These quotations have been set forth at the risk of lengthening this opinion in order to demonstrate that the test is not an exact one, but that from the pronouncements of the United States Supreme Court we can obtain at least some general guidance as to a standard by which to judge the validity of such legislation. Summed up, it might be stated like this: The right of contract may be regulated by proper use of the police power of the state. Legislation in aid of this police power carries with it a strong presumption of validity, placing the burden of proof upon him who attacks it. It is not the province of the courts to review either the wisdom or practicability of the Amendment, nor does the earnest conflict of opinion on these matters bring it within judicial cognizance. Such legislation can be annulled by court decision only if it is palpably in excess of legislative power, if it is without any rational basis, and if on no reasonable theory could it contribute to the public health, welfare, or safety.

Reasonableness & Discrimination

Nor is the Amendment in question indefensible on the grounds of reasonableness. The National Labor Relations Act prohibits "yellow-dog" contracts in much the same fashion as our own legislature has prohibited them in Arizona, Sections 43-1608 and 56-120, A. C. A. 1939. The United States Supreme Court has sustained this federal legislation. N. L. R. B. *v.* Jones & Laughlin S. Corp., 301 U. S. 1, 81 L. Ed. 893; Phelps Dodge Corp. *v.* N. L. R. B., 313 U. S. 177, 85 L. Ed. 1271. If it is proper to legislate to

the effect that no employee shall be forced, as a condition of employment, to be a nonunion man, it would seem that legislation providing that no employee shall be forced, as a condition of employment, to be a union man, would be but a logical counterpart. Appellants attempt to answer this by an interesting contradiction within their own briefs. On the one hand they direct our attention to outdated and overruled cases and annotations holding anti-yellow-dog-contract legislation invalid. They admit that the Arizona statutes have never been tested, but suggest by implication that if tested they would, on the basis of this old line of decisions, be found invalid. Then, they conclude, "That if a law which prohibits an employer from denying employment to a union member is invalid, then the converse is true, and the amendment which prevents an employer from denying employment to a nonunion laborer is also invalid." However, in their own opening brief they recognize that "yellow-dog" contracts now can be and are constitutionally outlawed, and that their own citations to the contrary are now obsolete, overruled, and no longer the law when they state that "the state can constitutionally outlaw the so-called 'yellow-dog' contract whereunder nonmembership in the union is required as a condition of employment." (The old line of cases upholding "yellow-dog" contracts was based upon Coppage *v.* Kansas, 236 U. S. 1, 59 L. Ed. 441. As was stated in Phelps-Dodge Corp. *v.* N. L. R. B., supra, "The course of decisions in this Court since Adair *v.* United States * * * and Coppage *v.* Kansas * * * have completely sapped those cases of their authority.")

Appellants then continue with the other half of their contradiction. Assuming this time that our anti-yellow-dog-contract statutes are valid, they contend that the Amendment under consideration is discriminatory and unconstitutional by the terms of the Fourteenth Amendment in that it constitutes an "outrageous denial" to unions and union members of equal protection of the law. The gist of their argument is this: "Neither section (46-1608 or 56-120, A. C. A. 1939, invalidating yellow-dog contracts) makes it unlawful for the employer to deny employment to a union man or to discharge him on the ground that he is a member

of a union. The sections are limited in operation to the execution of contracts whereby the employee agrees not to remain or become a member of a labor organization. While the employer, if the sections are valid, would have no right to enter into the contracts condemned, he would have the undoubted right to refuse to hire a union man, and the right to discharge him upon the ground that he was a member of the union."

Appellants concede that in the field of interstate industries the National Labor Relations Act provides the protection they seek. In regard to those industries whose business is wholly intrastate we must point out that the equal protection clause requires only "that all persons subject to such legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and liabilities imposed." Hayes *v.* Missouri, 120 U. S. 68, 30 L. Ed. 578. There is no question but that this test is here met. Nor is it necessary for the people to have encompassed in one constitutional amendment a corrective for all the evils which may or do arise in the field of employer-employee relations.

> "* * * This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' *If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.'* There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms. * * *" West Coast Hotel Co. *v.* Parrish, supra. (Emphasis supplied.)

* * * * * * *

> "* * * *We have frequently said that the legislative authority exerted within its proper field, need not embrace all the evils within its reach.* The Constitution does not forbid 'cautious advance, step by step,' in

dealing with evils which are exhibited in activities within the range of legislative power. * * *" N. L. R. B. *v.* Jones & Laughlin S. Corp., supra. (Emphasis supplied.)

* * * * * * * *

"Any legislation in exercise of the police power must perforce affect in different degrees persons or groups within its orbit who occupy different economic, social or political positions with reference to the ends sought by the legislation. Thus Chapter 328 may enable a non-union workman to obtain a 'free ride' by receiving benefits attained through the expense and efforts of union workmen, but neither this nor other illustrations which might be given of the variable incidences of the statute upon persons differently circumstanced can render the Act discriminatory. Chapter 328 is geographically coextensive with the State of North Carolina and its provisions are applicable with the same force to all employers within those boundaries just as they are applicable to all employees therein. It is difficult to see how, within the scope of its authority, the statute could be more uniform in its application." State *v.* Whitaker, N. C., decided Dec. 19, 1947, not yet reported. (Emphasis supplied.)

We hold that by this standard the Amendment is not discriminatory, and, hence, appellants' assignment of error No. 2 is without merit.

Pro and Con

As stated before, because of the presumption that the Amendment is a proper exercise of the police power in the interest of the public, the burden is upon appellants to establish that it is without rational basis. To sustain this burden they earnestly contend that such a law strikes at the roots of the security of unionism as an institution, and that enforcement of the Amendment will eventually destroy labor organizations in Arizona. Arguendo, they say that outlawing any type of union-security agreement (whether the

traditional union shop, closed shop, or maintenance of membership) destroys the principle which, as Justice Jackson said, is the "ultimate goal of most union endeavor." Wallace Corp. *v.* N. L. R. B., 323 U. S. 248, 89 L. Ed. 216. Union security agreements, they claim, have never been judicially held malum in se but on the contrary are an established practice in modern industrial society and have been uniformly recognized and upheld throughout the nation. They contend that any abuses or injurious practices that may exist therein may be readily corrected by legislation aimed specifically at such abuses without absolute prohibition of union-security contracts. They further point out that such agreements are of benefit to organized labor in that they are designed to gain job security, protection from discrimination, equality of bargaining power, and the promotion of better working conditions for all employees; that with such agreements in force disciplinary action may be more effectually imposed upon workers to compel their compliance with existing contracts; and, finally, that they eliminate jurisdictional strife and result in better labor-management cooperation. Incidentally, they point out, such agreements eliminate the "free riders" (nonunion members who benefit by union efforts but do not share the costs). All in all, they conclude that there are no overwhelming evils incident to the union-security relationship that can be cured only by prohibitory legislative fiat such as the Amendment in question. Based upon their contention that circumstances do not warrant the suppression of such agreements, they charge the Amendment to be arbitrary, unreasonable, and excessive.

Appellees, however, maintain that appellants' claim as to injuries resulting from the Amendment are "more fanciful than real" in that the Amendment does not discriminate against union members, prohibit membership in a union, or interfere with well-established collective bargaining processes such as the right to strike and to picket peaceably. Furthermore, appellees contend that the Amendment was enacted through the initiative by the people of the State of Arizona (our supreme legislative power) to eliminate bona fide abuses that had arisen in the field of labor-man-

agement relations, and to overcome the evils incident to the closed shop. This was an effort by the legislative department to satisfy what they believed were the demands of public welfare by diminishing in part the area of permissible conflict open to industrial combatants. Evidently the people of Arizona determined that in the public interest the weapons which labor might use in obtaining its ends required further restriction. On the national scene the Taft-Hartley Act undoubtedly was adopted for that very purpose. (See Committee Reports of the 80th Congress, First Special Session, Senate Report No. 105 and House Report 245 outlining existing abuses.) From the 1946 Initiative and Referendum Publicity Pamphlet and from appellees' brief we summarize some of the evils and abuses alleged to have arisen: (1) a monopoly of labor which the closed shop fosters such being its ultimate goal; (2) "feather-bedding", (doing less than a worker is capable of, caused by restrictive union rules); (3) secondary boycotts; (4) jurisdictional disputes. Affirmatively appellees assert that the Amendment aids in establishing industrial peace and, above all, that it prohibits a denial or abridgment of any person's right to obtain or retain employment because of nonmembership in any labor organization.

The people of the State of Arizona evidently had some deep-seated convictions upon these matters for it required the signatures of fifteen per cent of the qualified electors of the entire state to even propose an amendment to the Constitution (Article 4, Part 1, Section 2), and it is a matter of common knowledge that the arguments for and against the proposed Amendment were fully and completely presented to the people in the pre-election campaign. In adopting the Amendment by a very substantial majority (61,875 votes cast for and 49,557 cast against said measure) the people have in the most solemn manner evidenced their conviction that the matters prohibited by it were detrimental to the public welfare. We are not called upon here to determine either the wisdom of the people's action or who is right and who is wrong in the opposing arguments here summarized. Possibly only time can give a correct answer to this highly controversial question. Our sole con

cern is whether the Amendment is in violation of the federal organic law. The test we must apply is simply to discover whether the law "has a rational basis" and "could on any reasonable theory contribute to the public welfare." The considered and deliberate action of the people of Arizona has determined this in the affirmative; rule by the majority is the essence of democracy.

Effect of Similar Legislation

In his famous dissenting opinion in Truax *v.* Corrigan, 257 U. S. 312, 66 L. Ed. 254, Justice Brandeis said:

> "• • • Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and wide-spread, and has been reached after deliberation. • • •"

See also Muller *v.* Oregon, 208 U. S. 412, 52 L. Ed. 551. In this regard it is instructive to note that within a fairly short space of time no less than sixteen states have adopted similar legislation, four by constitutional amendment (Arizona, amendment adopted Nov. 1946; Arkansas, amendment adopted Dec. 1944; Florida, amendment adopted Nov. 1944; Nebraska, amendment adopted Nov. 1946) and twelve by statute (Delaware 1947, Georgia 1947, Louisiana 1934, Maryland 1939, Maine 1947, North Carolina 1947, North Dakota 1947, South Dakota 1945-Const. Amend. 1947, Tennessee 1947, Texas 1947, Virginia 1947, Iowa 1947). In new Mexico the legislature has submitted a similar constitutional amendment to the people for their approval. The lower courts of three of the above states have recently upheld these statutes as not being in conflict with the state and federal constitutions. A. F. of L. *v.* American Sash & Door Co. (Ariz., July 28, 1947 — this case); Federal Firefighters of Oak Ridge *v.* Roane-Anderson Co. (Tenn., April 15, 1947); Lincoln Federal Labor Union *v.* Northwestern Iron & Metal Co. (Nebr., July 7, 1947). In addition, the North Carolina Supreme Court in a well-reasoned opinion has sustained the validity of its statute (State *v.* Whitaker, De-

cember 19, 1947); and a three-judge Federal District Court for the Southern District of Florida did likewise with the Florida statute (A. F. of L. v. Watson, 60 F. Supp. 1040, reversed by the Supreme Court of the United States on jurisdictional grounds only, A. F. of L. v. Watson, 327 U. S. 582, 90 L. Ed. 873).

In the field of federal legislation the principles set forth in the Amendment under consideration have been adopted in several instances. The Railway Labor Act, 45 U. S. C. A., section 152, Fifth, provides that:

> "Agreements to join or not to join labor organizations forbidden. Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way."

The United States Supreme Court had occasion to review this legislation and sustained it. Virginian R. Co. v. System Fed. R. E. D., 300 U. S. 515, 81 L. Ed. 789; Texas & N. O. R. Co. v. Brotherhoods, etc., 281 U. S. 548, 74 L. Ed. 1034. Again, the Federal Bankruptcy Act of 1933 (47 Stat. 1481, sec. 77(p), (q)), prohibits a trustee in bankruptcy from entering into a closed-shop agreement with a union covering employment in any enterprise for which he is acting as trustee. And, finally, Title 1, Section 14 (b) of the Taft-Hartley Act, amending the National Labor Relations Act specifically recognizes the right of states to pass such legislation, and appropriately restricts the use of federal law when such occurs by stating:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

In view of the great number of states which have seen fit to consider such legislation an appropriate and necessary exercise of the police power, and in view of the recognition given by the federal government both to the principles contained in such legislation and the right of states to adopt such, it might well be presumptuous of this court, in applying the test for such legislation set down by the Supreme Court of the United States, to find our Amendment "palpably in excess of legislative power", "without rational basis", and to hold that "on no reasonable theory could it contribute to the public health, safety or welfare." We find ourselves in agreement with the following statement of Associate Justice Seawell, writing for the Supreme Court of North Carolina in the decision which sustained the constitutionality of a similar act (State v. Whitaker, supra):

> "* * * Great weight must be attached to the fact that so many separate jurisdictions have, within a short space of time, seen fit to exercise their police power in the same manner and for the same purposes. The composite will of such a broad cross section of our country cannot be lightly discarded as unreasonable, arbitrary or capricious or lacking in substantial relationship to its objective. * * *"

And, to the same effect but concerning a different sort of police power legislation, Chief Justice Hughes in West Coast Hotel Co. *v.* Parrish, supra, said:

> "* * * The adoption of similar requirements by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."

Freedom of Speech and Assembly:

Appellants' third assignment of error and third proposition of law are devoted to the contention that "the amend

ment impairs and previously restrains the exercise of the civil rights of assembly and speech guaranteed under the First Amendment, and as protected against state invasion by the Fourteenth Amendment", and they claim that for this reason the court erred in dismissing the complaint and rendering judgment for appellees. Appellants support this contention with the argument that "by the prohibition of union shop agreements * * * organizations of laborers, for the purpose of assembly, speech and security, are wholly ineffective."

In this regard appellants direct our attention to four recent landmark decisions of the United States Supreme Court. Hague v. C. I. O., 307 U. S. 496, 83 L. Ed. 1423; Thornhill v. Alabama, supra; West Virginia v. Barnette, 319 U. S. 624, 87 L. Ed. 1628; Thomas v. Collins, 323 U. S. 516, 89 L. Ed. 430. These cases, appellants contend, establish the principle that the right to assemble and function through labor organizations is a concomitant of the civil right of assembly guaranteed by the foregoing constitutional provisions. With this summary of the general tenor of these holdings we agree. But the application of either the facts or principles announced in these cases to the case at bar is difficult to see.

In the Hague case, supra, the C. I. O. union complained that a Jersey City ordinance (which forbade the leasing of any hall without a permit from the Chief of Police for a public meeting at which the speaker would advocate the obstruction, overthrow, or change of government by other than lawful means) was being used to prevent the union from discussing rights afforded to workers by the National Labor Relations Act. And that another ordinance (forbidding the public distribution of printed matter) prevented the union from informing workers of their rights by circulars. The court held that such use of these ordinances infringed the privileges and immunities of citizens concerned as "the right peaceably to assemble and to discuss these topics and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the (Fourteenth) Amendment protects."

The Thornhill case, supra, was concerned with the use of an Alabama anti-picketing statute when used to prohibit peaceful picketing. The court held that "The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature * * * (passing such a law)", and that "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly * * * all matters of public concern without previous restraint or fear of subsequent punishment."

The Barnette case, supra, dealt with a resolution adopted by the West Virginia Board of Education requiring that a salute to the flag be a regular part of the activities of their public schools and that refusal to comply therewith be grounds for suspension. Certain children subscribing to the faith of Jehovah's witnesses refused to salute as being against the dictates of their faith in that the salute represented to them placing an image of man above the laws of God. The court held that expulsion from school for such refusal invaded the sphere of the intellect and spirit which it is the purpose of the First and Fourteenth Amendment of the Constitution to reserve from all official control.

Thomas v. Collins, supra, dealt with a Texas statute which required an out of state union speaker to secure an organizer's card from state officials before being allowed to speak and solicit union memberships. The court reaffirmed the power of the state to regulate labor unions with a view to protecting public interest but held that freedom of speech and assembly cannot be restricted unless required to save the public from a clear and present danger.

The foregoing brief summary of the situations which faced the United States Supreme Court in these free speech cases constitutes the best possible answer to their applicability to the case at bar. Nothing in the Amendment here under consideration either prevents, restricts, or even attempts to regulate the freedom of men to speak, assemble, or think. The Amendment goes solely to prohibiting certain types of employment contracts or policies which the voters of Arizona believe work an injustice to nonmembers

of labor organizations and so mitigate against the public welfare. We are impressed with the very recent statement of the Supreme Court of North Carolina on this subject:

> "* * * On the contrary, it seems to us that Chapter 328 may serve to secure the rights of free speech and assembly to all persons concerned. The statute protects the * * * rights of workmen to express their individual opinions by refusing to join unions. The right of either side, or any faction of any side, to a labor controversy to assemble and publicize its own ideas remains inviolate." State v. Whitaker, supra.

For the foregoing reasons we hold that the Amendment in nowise violates the constitutional rights of freedom of speech or assembly.

Prospective and Retrospective Operation

Holding as we do that the Amendment is constitutional, there remains to be decided only the question of whether it applies to contracts existing at the effective date of the Act. Appellants, as their fourth assignment of error, charge that the trial court improperly held the Amendment to void such contracts. And a part of their fourth proposition of law states:

> "Constitutional, like statutory provisions are construed to operate prospectively only, unless on the face of the measure the contrary intention is clearly manifest. * * *"

The above quoted portion of the fourth proposition of law is entirely sound and correct. 11 Am. Jur., Constitutional Law, section 35; 16 C. J. S., Constitutional Law, section 40(a); City of Shreveport v. Cole, 129 U. S. 36, 32 L. Ed. 589. It is difficult, however, to understand appellants' attempted application of this rule of law to the case at bar. The Amendment in question provides that from and after its effective date "No person shall be denied the opportunity to obtain or retain employment * * * (etc.) or any corporation, individual or association of any kind enter into

any agreement, written or oral, which excludes any person from employment. * ** * (etc.)". The latter clause specifically prevents future contracts of a kind inimical to the Amendment, while the former clause grants immediately to persons concerned the protection the Amendment affords. As has been previously shown, there is reserved to the state the right to regulate and control contracts, and the Constitution and laws of the state are a part of each contract. Home Bldg. & Loan Ass'n. v. Blaisdell, supra. The effect of appellants' argument is that persons by making contracts extending into the future may prevent the exercise of the police power by the state. The agreements in the record extend year after year unless terminated by thirty days' notice at the end of an annual period. It must be remembered that a statute is not retrospective from the mere fact that it relates to antecedent facts. Cox v. Hart, 260 U. S. 427, 67 L. Ed. 332; State v. Martin, 59 Ariz. 438, 130 P. 2d 48. Under appellants' theory, although these agreements are found by the voters to be injurious to the public health, safety, and welfare they are immune from the exercise of the police power if executed before the police power is exercised. The gist of such argument is that rights under a contract are, under the Constitution, more sacred than the public health, safety, and welfare. A mere statement of the proposition demonstrates its absurdity.

Conclusion.

In conclusion we find that the right to contract may be abridged by proper exercise of the state's police power without violating the Federal Constitution. The yardstick by which we must judge whether our Amendment constitutes such proper exercise of the police power highly confines and limits the scope of our inquiry. We may not pass on the wisdom, the practicability, or the desirability of such legislation. We must look to see only that it has some rational basis; is supportable on some reasonable theory; is not capricious, arbitrary, or discriminatory. We must further guide our view by a strong presumption of validity in favor of such legislation, putting the burden upon those

who attack it. Nor does this limited review by the courts seem untoward. In the last analysis it should be and is the prerogative of the people to determine and experiment with their own social and economic legislation and for the courts merely to see that they do not get "out of bounds" and that they remain within the framework of our government by staying within the limits of the Constitution. No less an authority than Professor Charles O. Gregory, former counsel to the U. S. Department of Labor and one of the nation's foremost scholars and champions of the labor movement, has this to say on the subject of the validity of legislation such as is here before us:

> "* * * if a majority of (the voters) see fit to conclude that the closed or union shop be made unlawful in their state, that is their business. And it is hard to see on what grounds such legislation could possibly be overturned as unconstitutional." Gregory, Labor and the Law, Norton & Co., 1st Ed., 1946, page 113.

A consideration of all these fundamental concepts impels the conclusion that this Amendment to the Arizona Constitution, when measured by the yardstick fashioned for us by the United States Supreme Court, does not contravene any provisions of the federal organic law. We cannot say that it does not have a rational basis or could not on some reasonable theory contribute to the public welfare, where, as here, it is addressed to a legitimate end and the measures taken are considered by the voters reasonable and appropriate to that end. The rights of free speech and assembly remain inviolate. Labor's basic rights to organize into a union, bargain collectively, to strike, and peaceably picket are not abridged. These things being established, the wisdom and propriety of the legislative action is not for the determination of the courts, but is a matter for the determination of the people of this sovereign state upon whom the duty and responsibility of decision rests. There is then both the force of logic and the recognition and will of the people of Arizona that this is necessary and proper legislation. Together with this, there is a similar recog-

nition on the part of the people of fifteen other states and the Federal Government that this is a desirable and proper use of the police power directed toward an appropriate legislative purpose. There can be no valid argument made that such legislation is discriminatory or that its effect upon existing contracts should be limited.

Judgment affirmed.

LEVI S. UDALL,
Justice.

Concurring:
ARTHUR T. LAPRADE,
Justice.

Stanford, C. J., dissenting in part:

I favor the majority opinion in upholding the following portion of the Amendment:

> "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, * * *."

I agree with the statement of law made by Justice Hughes in the case of Truax *v.* Raich, 239 U. S. 33, 36 Sup. Ct. Rep. 7, wherein he said:

> "* * * It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. * * *"

The second portion of the Amendment is unconstitutional, for the constitution prohibits the impairment of contracts, but the majority opinion approves and upholds it on the grounds of the state's police power. On that subject from the case of Treigle *v.* Acme Homestead Asso., 297 U. S. 189, 80 L. Ed. 575, I quote:

> "Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the

means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

Also from the case of Home Building & Loan Asso. *v.* Blaisdell, 290 U. S. 398, 78 L. Ed. 413, I quote:

"• • • the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions."

I think that to exercise the police power in support of the second portion of this Amendment is arbitrary and oppressive, and I accordingly dissent.

R. C. STANFORD,
Chief Justice.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 27

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL.,
Appellants,

vs.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

Appeal from the Supreme Court of the State of Arizona

No. 47

LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL.,
Appellants,

vs.

NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION

Appeal from the Supreme Court of the State of Nebraska

No. 34

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, ET AL.,
Appellants,

vs.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 27

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL.,
Appellants,

vs.

AMERICAN SASH AND DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

Appeal from the Supreme Court of the State of Arizona

No. 47

LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL.,
Appellants,

vs.

NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION

Appeal from the Supreme Court of the State of Nebraska

No. 34

GEORGE WHITAKER, A. M. DEBBUHL, T. G. EMBLER, ET AL.,
Appellants,

vs.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

BRIEF FOR APPELLANTS

Preliminary Statement

This Court has granted appeals from decisions of the Supreme Courts of Arizona, Nebraska and North Caro-

lina, in each of which substantially similar state laws prohibiting any form of union-security arrangement or agreement were held not to contravene the federal Constitution. The principle issue in each case is whether the law in question deprives the respective appellants of any federally protected right, and hence must be stricken down as being in violation of the federal Constitution. Since the applicable legal principles are, for the most part, the same in each of the three cases, the respective appellants, with the consent of the respective appellees and with this Court's indulgence, have joined together to present their arguments in one major brief. It is hoped, thereby, that much duplication of argument and citation of authority can be avoided. In so far as any principle of law is applicable to one case only, that will be set forth separately in a separate portion of this brief, as will be a discussion of the respective prohibitory laws involved, together with their application to the particular facts in each case.

Opinions Below

The opinion of the Supreme Court of the State of Arizona (No. 27, R. 111-132) is reported under the name of *American Federation of Labor, et al. v. American Sash & Door Company, et al.*, 67 Ariz. 20, 189 Pac. (2) 912.

The opinion of the Supreme Court of the State of Nebraska (No. 47, R. 52-78) is reported under the name of *Lincoln Federal Labor Union No. 19129, et al. v. Northwestern Iron and Metal Company, et al.*, 149 Neb. 507, 31 N. W. (2d) 477.

The opinion of the Supreme Court of the State of North Carolina (No. 34, 57-80) is reported under the name of *State v. Whitaker, et al.*, 228 N. C. 352, 45 S. E. (2d) 860.

Jurisdiction—Arizona Case (No. 27)

The federal questions here presented were properly raised and preserved and were passed upon by the courts

below (No. 27, R. 37-46, 96, 110-111, 112-132). The judgment of the Supreme Court of Arizona was entered on February 4, 1948 (No. 27, R. 142). The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended, 28 U.S.C.A. 344. On March 29, 1948, this Court noted probable jurisdiction (No. 27, R. 143).

Jurisdiction—Nebraska Case (No. 47)

The federal questions here presented were properly raised and preserved and were passed upon by the courts below (No. 47, R. 16-19, 44, 46-49, 50, 53). The judgment of the Supreme Court of Nebraska was entered on March 19, 1948 (No. 47, R. 52). The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended, 28 U.S.C.A. 344. On May 24, 1948, this Court noted probable jurisdiction (No. 47, R. 86).

Jurisdiction—North Carolina Case (No. 34)

The federal questions here presented were properly raised and preserved and were passed upon by the courts below (No. 34, R. 4, 5, 6, 56, 57-80). The judgment of the Supreme Court of North Carolina was entered on December 19, 1947 (No. 34, R. 80). The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended, 28 U.S.C.A. 344. On March 29, 1948, this Court noted probable jurisdiction (No. 34, R. 88).

Questions Presented

The question presented in each of the foregoing cases is whether, pursuant to either a constitutional amendment or a statute, a State may, consistent with the federal Constitution, flatly prohibit rather than regulate the right of labor organizations and employers to enter into and enforce mutually satisfactory arrangements concerning union secu-

rity whereunder an employee is required to maintain union membership as a condition of employment.

Statutes Involved—Arizona Case

At the 1946 general election the State of Arizona duly adopted the following amendment to its constitution:

> "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the state or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization."

Statutes Involved—Nebraska Case

On November 5, 1946, the State of Nebraska duly adopted the following amendment to its constitution, which amendment, designated as Sections 13, 14 and 15 of Article XV, became effective November 11, 1946:

> "Section 13. No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or non-membership in a labor organization.
>
> "Section 14. The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.
>
> "Section 15. This article is self-executing and shall supersede all provisions in conflict therewith; legisla-

tion may be enacted to facilitate its operation but no law shall limit or restrict the provisions hereof."

Statutes Involved—North Carolina Case

The Legislature of the State of North Carolina, at its 1947 session, passed the following statute (Ch. 328 of the Session Laws of 1947):

"An Act to Protect the Right to Work and to Declare the Public Policy of North Carolina with Respect to Membership or Non-membership in Labor Organizations as Affecting the Right to Work: To Make Unlawful and to Prohibit Contracts or Combinations Which Require Membership in Labor Unions, Organizations or Associations as a Condition of Employment: To Provide That Membership in or Payment of Money to Any Labor Organization or Association Shall Not Be Necessary for Employment or for Continuation of Employment and to Authorize Suits for Damages.

"The General Assembly of North Carolina do enact:

"Section 1. The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization or association.

"Sec. 2. Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina.

"Sec. 3. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

"Sec. 4. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

"Sec. 5. No employer shall require any person, as a condition of employment or continuation of employment to pay any dues, fees, or other charges of any kind to any labor union or labor organization.

"Sec. 6. Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 3, 4, and 5, or of one or more of such Sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment.

"Sec. 7. The provisions of this Act shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract.

"Sec. 8. If any clause, sentence, paragraph or part of this Act or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, and the application thereof to other person or circumstances, but shall be confined to the part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved.

"Sec. 9. All laws and clauses of laws in conflict with this Act are hereby repealed.

"Sec. 10. This Act shall be in full force and effect from and after its ratification."

Chapter 75 of the General Statutes makes combinations, conspiracies and contracts in restraint of trade illegal and punishable as misdemeanors.

Statement of the Case--Arizona

The factual situation in respect to which the Arizona amendment has been applied is set forth in a complaint for declaratory judgment and equitable relief, the defendants named in such complaint having moved to dismiss such complaint, and the trial court and the State Supreme Court having sustained such motions. The plaintiffs in the trial court are the appellants here, and the defendants are the appellees herein.

The appellants are the American Federation of Labor (No. 27, R. 4); the Arizona State Federation of Labor (No. 27, R. 4); Phoenix Building and Construction Trades Council (No. 27, R. 5); the United Brotherhood of Carpenters and Joiners of America, A.F.L. (No. 27, R. 6); Millmen, Cabinet Makers and Lumber Handlers Union No. 2093, affiliated with such United Brotherhood of Carpenters and Joiners of America, which takes into membership employees in the wood milling and cabinet making trades in the City of Phoenix (No. 27, R. 7); Forrest L. Stiers, President of such Local, employed by the appellee American Sash & Door Company (No. 27, R. 7), and Ralph Henley, an employer engaged in the manufacture of sash, doors and fixtures in the City of Phoenix and doing business under the name of Ralph Henley Millwork (No. 27, R. 19).

The appellees are the American Sash & Door Company, an employer engaged in manufacturing sash and doors in interstate commerce (No. 27, R. 20); D. A. Brewer, an employer engaged in concrete construction work in intrastate commerce (No. 27, R. 21); three individuals whose employment status is affected under union-shop agreements (No. 27, R. 21-22), and the State Attorney General (No. 27, R. 22).

On February 12, 1947, appellants filed a complaint as plaintiffs in the Superior Court of Maricopa County, seeking a declaratory judgment and equitable relief in respect to the application or attempted application as against them of an amendment to the Constitution of the State of Arizona, adopted in November of 1946 and commonly referred to as the "Right-to-Work" or "Anti-Closed-Shop" Amendment (No. 27, R. 1-55).

As disclosed by the complaint, the amendment was being applied or threatened to be applied in respect to the four following factual situations:

1. Prior to the adoption of the Amendment, appellant Local Union No. 2093 (which then and at all times subsequently represented all of the employees in the bargaining unit (No. 27, R. 23)) entered into a contract requiring membership as a condition of employment with appellee American Sash & Door Company (No. 27, R. 23), an employer engaged in interstate commerce (No. 27, R. 20), as did also appellant Phoenix Building and Construction Trades Council with appellee D. A. Brewer (No. 27, R. 24), an employer engaged in intrastate commerce (No. 27, R. 21). At a date subsequent to the Amendment, one employee of each of said employers wilfully defaulted in dues, and lost his membership in his union (No. 27, R. 33, 34). The respective unions requested such employers to discharge such employees pursuant to the union-security clause, but the employer refused to do so solely because of the existence of the Anti-Closed-Shop Amendment and because of threats, both by the Attorney General of the State and by the individuals whose discharge was requested, to institute civil and criminal prosecutions for violations of the Amendment (No. 27, R. 33, 34).

2. Subsequent to the effective date of the Amendment, appellant-employer Ralph Henley and appellant Local Union No. 2093 (which then and ever since has represented all of the employees of the said employer (No. 27, R. 25)) entered into an agreement which, among other things,

required membership in the union as a condition of employment (No. 27, R. 26). A member of the union employed by Henley wilfully defaulted in dues, and lost his membership in the union (No. 27, R. 36). The union requested such employer to discharge the employee pursuant to the union-security clause, but the employer, although otherwise willing, refused to do so because of the existence of the Anti-Closed-Shop Amendment and because of threats, both by the Attorney General of the State and by the union member whose discharge was requested to institute civil and criminal prosecutions for violation of the Amendment (No. 27, R. 36).

3. Appellant Arizona State Federation of Labor had for many years published and distributed a labor newspaper on behalf of the labor movement. It customarily employed only union members. Subsequent to the effective date of the Amendment, it denied employment to an applicant upon the sole grounds that he was not a member of a labor organization (No. 27, R. 26-27). The Attorney General of the State thereupon threatened to institute civil and criminal prosecutions against such appellant (No. 27, R. 31-32).

4. The Attorney General of the State has made repeated threats to all the appellants and to other labor organizations and employers similarly situated that he would immediately bring civil and criminal prosecutions if there were any violations of the law, as by attempting to make or by making any type of union-security agreement, or by enforcing any union-security agreement (No. 27, R. 30-32).

It was alleged (and thus admitted for the purpose of this case) that the ability to enter into and secure union-shop or other union-security contracts or arrangements with employers was indispensable to the functioning of appellants and other labor organizations and to the fulfillment of their purposes (No. 27, R. 11); that the obtaining of union-security agreements constitutes the only proven and effective means for working people to obtain and insure (1)

their collective security and the maintenance of their labor unions once organization is achieved; (2) an equality of bargaining power as a means of obtaining an adequate share of the joint product of capital and labor, and (3) the consolidation of gains achieved in collective bargaining and the protection of working standards through elimination of the cutthroat wage competition of non-union employees; that the organizations in question had duly adopted provisions in their constitutions requiring all persons desiring to obtain or retain membership in the organization to work only with persons who were also members of the union (No. 27, R. 14); that membership in plaintiff labor organizations, including the appellant United Brotherhood of Carpenters and Joiners of America and plaintiff Local Union No. 2093, as well as all other labor organizations operating in the State of Arizona, is open to all qualified persons, and such organizations freely admit qualified applicants into membership and impose no arbitrary or unreasonable requirements as a condition of membership (No. 27, R. 16).

The appellants alleged that the Amendment in question was unconstitutional and void for the following reasons: (a) the Amendment impaired the obligations of existing contracts in violation of Article I, Section 10, of the United States Constitution; (b) the Amendment arbitrarily and unreasonably deprived appellants of fundamental rights, liberties and freedoms protected under the Fourteenth Amendment to the United States Constitution; (c) the Amendment deprived the union appellants of fundamental rights and freedoms guaranteed under the First Amendment as a concomitant of the right of assembly and speech and protected against invasion by the State under the Fourteenth Amendment, and (d) the Amendment denied the union appellants equal protection of the laws contrary to the Fourteenth Amendment (No. 27, R. 37-46).

Appellants alleged grave, immediate and irreparable damage to them if the Amendment were to be applied as

threatened (No. 27, R. 46-49). Included in such injury was disruption of employment relations and production, loss of present and prospective members, disorganization and disintegration of the unions and loss in their bargaining position, multiplicity of prosecutions in labor proceedings.[1]

Appellants sought the following relief in their complaint: (a) an injunction in the nature of a decree for specific performance requiring the respective employers to fulfill their obligations under their contracts; (b) injunctive relief against the Attorney General and his agents, restraining them from enforcing or threatening to enforce the Anti-Closed-Shop Amendment; and (c) a declaratory judgment setting forth the rights and duties of the parties under their existing agreement and under the Amendment (No. 27, R. 50-55).

Appellees moved to dismiss the complaint on the ground that since the Amendment was constitutional no cause of action was stated (No. 27, R. 83-86). The trial court granted these motions and orderd the complaint dismissed on the ground that the Amendment did not violate the federal Constitution (No. 27, R. 95-98, 108).

Appellants then appealed to the Supreme Court of the State of Arizona, raising the same constitutional issues that were raised under the complaint (No. 27, R. 99, 110).

On February 4, 1948, the Supreme Court of the State of Arizona handed down its decision and judgment in which it considered each of the federal questions raised by the appellants, decided each of such questions adversely to appellants' contentions and affirmed the judgment below (No. 27, R. 112-132). One of the three justices dissented (No. 27, R. 132). In its judgment the Supreme Court of

[1]In short, the irreparable injury alleged in the present case is the same as that alleged in the case of *American Federation of Labor, et al. v. Watson*, 327 U.S. 582, which this Court found sufficient to invoke the equitable jurisdiction of a Federal District Court. The State Supreme Court made no finding that the facts alleged were insufficient to justify equitable relief but, instead, dismissed the complaint on the sole ground that the Amendment was constitutional.

Arizona affirmed the judgment of the trial court in dismissing the complaint (No. 27, R. 142). The sole reason assigned for dismissal of the complaint was the constitutionality of the Amendment, the complaint otherwise stating a cause of action in each of the particulars alleged. Thus, the Supreme Court construed the Amendment (1) to impair the obligations of union-security agreements entered into prior to the effective date of the Amendment; (2) to prevent the making or enforcing of agreements entered into subsequent to the effective date of the law; (3) to prevent employers from employing union members only, and (4) to be enforceable by suit for injunction and suit for damages and by criminal prosecutions by the Attorney General.

Thereafter, appeal was taken to this Court (No. 27, R. 133), and on March 29, 1948, this Court noted probable jurisdiction (No. 27, R. 143).

Statement of the Case—Nebraska Case

The factual situation in respect to which the Nebraska amendment has been applied is set forth in a complaint for declaratory judgment and equitable relief, the defendants named in such complaint having moved to dismiss such complaint, and the trial court and the State Supreme Court having sustained such motions. The plaintiffs named in the complaint are the appellants here, and the defendants are the appellees herein.

The appellants are the American Federation of Labor (No. 47, R. 2); Lincoln Federal Labor Union No. 19129, a local labor union affiliated with the American Federation of Labor, whose members are employed in Lincoln, Nebraska, by the Northwestern Iron and Metal Company (No. 47, R. 4, 5); the Nebraska State Federation of Labor (No. 47, R. 2), and Henry Reichel, President of Lincoln Federal Labor Union No. 19129, employed by the appellee Northwestern Iron and Metal Company (No. 47, R. 4).

The appellees are the Northwestern Iron and Metal Company, an employer engaged in the scrap metal business

(No. 47, R. 4); Dan Giebelhouse, an employee of such employer (No. 47, R. 5, 9), and the State of Nebraska (No. 47, R. 12). The Nebraska Small Business Men's Association, an organization of business firms operating in the State of Nebraska, moved for and were granted leave to appear in the case as an intervenor (No. 47, R. 38, 39).

The complaint alleged that prior to the adoption of the Amendment the employees of the Northwestern Iron and Metal Company unanimously selected the appellant Lincoln Federal Labor Union No. 19129 as their bargaining representative and unanimously authorized such union to enter into a union-shop contract with the appellee Northwestern Iron and Metal Company (No. 47, R. 11). Such contract, requiring all the employees to maintain their membership in good standing as a condition of employment (No. 47, R. 9), was entered into between the union and the employer also at a date prior to the effective date of the Amendment (No. 47, R. 9). At a time following the effective date of the Amendment, one of the employees, namely, Dan Giebelhouse, refused to pay his dues and lost his membership in the union (No. 47, R. 9). The union thereupon requested the employer to discharge such employee, but the employer, notwithstanding the express provision of its collective bargaining contract then in existence, refused to do so, taking the position that the Anti-Closed-Shop Amendment rendered the union-shop provisions invalid (No. 47, R. 10).

It was alleged (and thus admitted for the purpose of this case) that the ability to enter into and secure union-shop or other union-security contracts or arrangements with employers was indispensable to the functioning of appellants and other labor organizations and to the fulfillment of their purposes (No. 47, R. 6); that the obtaining of union-security agreements constitutes the only proven and effective means for working people to obtain and insure (1) their collective security and the maintenance of their labor unions once organization is achieved; (2) an equality of bargaining power as a means of obtaining an adequate

share of the joint product of capital and labor, and (3) the consolidation of gains achieved in collective bargaining and the protection of working standards through elimination of the cutthroat wage competition of non-union employees (No. 47, R. 7); that membership in appellant labor organizations, including the appellant Lincoln Federal Labor Union No. 19129, as well as all other labor organizations operating in the State of Nebraska, is open to all qualified persons, and such organizations freely admit qualified applicants into membership and impose no arbitrary or unreasonable requirements as a condition of membership (No. 47, R. 7).

The appellants alleged that the amendment in question was unconstitutional and void for the following reasons: (a) the amendment impaired the obligations of existing contracts in violation of Article I, Section 10, of the United States Constitution; (b) the amendment arbitrarily and unreasonably deprived appellants of fundamental rights, liberties and freedoms protected under the Fourteenth Amendment to the United States Constitution; (c) the amendment deprived the appellants of fundamental rights and freedoms guaranteed under the First Amendment as a concomitant of the right of assembly and speech and protected against invasion by the State under the Fourteenth Amendment; and (d) the amendment denied the appellants equal protection of the laws contrary to the Fourteenth Amendment (No. 47, R. 16-20).

The appellants sought the following relief in their complaint:

1. A declaratory judgment determining the rights, status and other legal relations of the parties to the contract with respect to said amendment and to declare said amendment to be unconstitutional and void as in conflict with the federal Constitution.

2. An order requiring the employer to specifically perform its contract under its terms, and enjoining the Com-

pany from continuing Dan Giebelhouse in its employ (No. 47, R. 20).

The appellees moved, in effect, to dismiss the complaint on the ground that, since the amendment was constitutional, no cause of action was stated (No. 47, R. 40, 41). The trial court granted such motions on such ground and, in doing so, considered and denied each of appellants' contentions respecting the invalidity of the amendment under the federal Constitution (No. 47, R. 44).

The appellants then appealed to the Supreme Court of Nebraska, assigning as error the action of the trial court in refusing to sustain appellants' contention that the amendment was unconstitutional in the various respects as set forth in the complaint and in refusing to grant the relief prayed. Pursuant to their appeal to the Supreme Court of Nebraska, appellants briefed and argued the specific questions under the federal Constitution that were raised before the trial court (No. 47, R. 50).

On March 19, 1948, the Supreme Court of Nebraska handed down its decision and judgment in which it considered each of the federal questions raised by the appellants, decided each of such questions adversely to the appellants' contentions and affirmed the judgment below (No. 47, R. 53). In its judgment the Supreme Court of Nebraska affirmed the judgment of the trial court in dismissing the complaint (No. 47, R. 52). The sole reason assigned for dismissal of the complaint was the constitutionality of the amendment, the complaint otherwise stating a cause of action in each of the particulars alleged. Thus, the Supreme Court construed the amendment (1) to impair the obligations of union-security agreements entered into prior to the effective date of the law; (2) to prevent the making or enforcement of agreements subsequent to the effective date of the law; (3) to prohibit any attempt by an employer to employ union members only, whether by formal agreement or otherwise; and (4) specifically to prevent enforcement of an agreement requiring an em-

ployee to maintain his good standing in the union as a condition of employment, and this even though such agreement was entered into prior to the effective date of the law.

Thereafter, appeal was taken to this Court (No. 47, R. 78), and on May 24, 1948, this Court noted probable jurisdiction (No. 47, R. 86).

Statement of the Case—North Carolina Case.

The North Carolina anti-closed-shop statute is before this Court on appeal from the criminal conviction for violation of the law by appellants in entering into a union-security agreement. Appellants in this Court were the defendants in the criminal proceedings in the North Carolina courts.

Appellant George Whitaker is a building contractor employing union labor in the City of Asheville, North Carolina (No. 34, R. 8, 14). Appellant A. M. DeBruhl is an officer of the Asheville Building and Construction Trades Council, A. F. of L., and the remaining appellants are officers, agents and members of local trade unions or craft organizations affiliated with the Council and with the American Federation of Labor, all functioning in the City of Asheville (No. 34, R. 8).

On May 20, 1947, the appellant Whitaker executed a collective bargaining agreement with the other appellants under which appellant Whitaker, among other things, agreed to employ only members of the local craft unions who were parties to such contracts (No. 34, R. 8). On July 15, 1947, a warrant was issued against the appellants charging them with having violated Chapter 328 of the Session Laws of 1947 (commonly known as the "Anti-Closed-Shop Law") by having entered into such agreement (No. 34, R. 2). More specifically, the warrant charged that appellants had entered into

> ". . . an illegal combination or conspiracy in restraint of the right to work and of trade or commerce in the State of North Carolina and against the public policy

of the State of North Carolina, by executing a written agreement or contract by and between said employer and said Labor Unions and Organizations or combinations, whereby persons not members of said unions or organizations are denied the right to work for said employer, or whereby membership is made a condition of employment or continuation of said employment by said employer and whereby said named unions acquired an employment monopoly in any and all enterprises which may be undertaken by said employer are required to become or remain a member of a labor union or labor organization as a condition of employment or continuation of employment by said employer whereby said unions acquire an employment monopoly in any and all enterprises entered into by said employer in violation of House Bill No. 229, Session 1947, General Assembly of North Carolina, Chapter 328, 1947 Session Laws of North Carolina, and particularly sections 2-3 and 5 thereof, and Chapter 75 of the General Statutes of N. C., . . .". (No. 34, R. 2-3).

Thereupon, the appellants, through their counsel, filed a written motion to quash the warrant, alleging, *inter alia*, that the said Chapter 328 was void, illegal and unconstitutional, in that it arbitrarily and unreasonably deprived appellants of fundamental rights, liberties and freedoms protected under the Fourteenth Amendment to the United States Constitution, deprived the appellants, other than Whitaker, of fundamental rights and freedoms guaranteed under the First Amendment as a concomitant of the right of assembly and speech and protected against invasion by the State under the Fourteenth Amendment, and denied such appellants equal protection of the laws contrary to the Fourteenth Amendment (No. 34, R. 4).

The motion was denied (No. 34, R. 5) and the appellants were tried before a jury. The jury found appellants guilty of the acts charged in the warrant and entered a verdict of guilty (No. 34, R. 5). The trial court adjudged the appellants guilty and imposed a fine of $50 on each appellant (No. 34, R. 7). The appellants then moved for

an arrest of judgment in which were raised the same constitutional objections that were raised under the motion to quash the warrant (No. 34, R. 6). This motion was likewise overruled (No. 34, R. 7). The appellants then assigned as error the trial court's action in overruling the motion to quash and the motion for arrest of judgment, as more particularly set forth in such motions, and appealed to the Supreme Court of the State of North Carolina (No. 34, R. 56).

While the evidence before the jury clearly indicated that appellants had entered into the union-security agreement as charged, there was also uncontradicted evidence by expert witnesses (and thus admitted for the purpose of this case) that the ability to enter into and secure union-shop or other union-security contracts or arrangements with employers was indispensable to the functioning of appellants and other labor organizations and to the fulfillment of their purposes; that the obtaining of union-security agreements constitutes the only proven and effective means for working people to obtain and insure (1) their collective security and the maintenance of their labor unions once organization is achieved; (2) an equality of bargaining power as a means of obtaining an adequate share of the joint product of capital and labor, and (3) the consolidation of gains achieved in collective bargaining and the protection of working standards through elimination of the cutthroat wage competition of non-union employees; that membership in appellant labor organizations, as well as all other labor organizations operating in the State of North Carolina, is open to all qualified persons, and such organizations freely admit qualified applicants into membership and impose no arbitrary or unreasonable requirements as a condition to membership.

Appellants, pursuant to their appeal to the Supreme Court of North Carolina on the foregoing assignment of errors, briefed and argued the federal questions before that Supreme Court. On December 19, 1947, the Supreme

Court of North Carolina handed down its decision and judgment in which it considered each of the federal questions raised by appellants, decided each of said questions adversely to appellants' contentions, and affirmed the conviction (No. 34, R. 57-80). Further, the Court specifically held that the violations of the law constituted a criminal offense (No. 34, R. 63), and construed the law completely to outlaw, not merely to condition or regulate, the making of union-security agreements in North Carolina, so that the use of such agreements is forbidden in the State under any and all circumstances. The judgment (No. 34, R. 80) specifically affirmed the judgment of the Court below, finding appellants guilty of a misdemeanor and fining them the sum of $50.00 each above costs.

Thereafter, appeal was taken to this Court (No. 34, R. 81), and on March 29, 1948, this Court noted probable jurisdiction (No. 34, R. 88).

Specification of Errors—Arizona Case

1. The Supreme Court of Arizona erred in affirming the judgment of the trial court dismissing appellants' complaint for the reason that the amendment was valid and did not contravene the federal Constitution, and thus no cause of action was stated.

2. The Supreme Court of Arizona erred in failing to hold that the amendment deprived union appellants of rights guaranteed under the First Amendment and protected against invasion by the State under the Fourteenth Amendment to the United States Constitution.

3. The Supreme Court of Arizona erred in failing to hold that the amendment was unconstitutional as impairing the obligations of existing contracts in violation of Article I, Section 10, of the United States Constitution.

4. The Supreme Court of Arizona erred in failing to hold that the amendment deprived appellants of rights protected under the due process clause of the Fourteenth Amendment to the United States Constitution.

5. The Supreme Court of Arizona erred in failing to hold that the amendment denied the union appellants the equal protection of the laws contrary to the Fourteenth Amendment to the United States Constitution.

Specification of Errors—Nebraska Case

1. The Supreme Court of Nebraska erred in affirming the judgment of the trial court dismissing appellants' complaint for the reason that the amendment was valid and did not contravene the federal Constitution, and thus no cause of action was stated.

2. The Supreme Court of Nebraska erred in failing to hold that the amendment deprived union appellants of rights guaranteed under the First Amendment and protected against invasion by the State under the Fourteenth Amendment to the United States Constitution.

3. The Supreme Court of Nebraska erred in failing to hold that the amendment was unconstitutional as impairing the obligations of existing contracts in violation of Article I, Section 10, of the United States Constitution.

4. The Supreme Court of Nebraska erred in failing to hold that the amendment deprived appellants of rights protected under the due process clause of the Fourteenth Amendment to the United States Constitution.

5. The Supreme Court of Nebraska erred in failing to hold that the amendment denied the union appellants the equal protection of the laws contrary to the Fourteenth Amendment to the United States Constitution.

Specification of Errors—North Carolina Case

1. The Supreme Court of North Carolina erred in sustaining the judgment and convictions of the trial court and in failing to hold that Sections 2, 3 and 5 of Chapter 328 of the North Carolina Session Laws of 1947 are invalid as contrary to the federal Constitution.

2. The Supreme Court of North Carolina erred in failing to hold that the statute deprived union appellants of rights guaranteed under the First Amendment and protected against invasion by the State under the Fourteenth Amendment to the United States Constitution.

3. The Supreme Court of North Carolina erred in failing to hold that the statute deprived appellants of rights protected under the due process clause of the Fourteenth Amendment to the United States Constitution.

4. The Supreme Court of North Carolina erred in failing to hold that the statute denied the union appellants the equal protection of the laws contrary to the Fourteenth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

The laws involved herein flatly prohibit, do not regulate, any agreement or arrangement between labor organizations and employers whereunder union membership is made a condition of employment, and this without providing any substitute or equivalent for the function performed by such agreements in protecting labor organizations and making them effective. As such, they adversely affect not only contract rights and liberties protected under the Fourteenth Amendment and the contract clause, but also impair the fundamental right of assembly as exercised by workingmen when they seek to form and maintain unions. *N.L.R.B. v. Jones & Laughlin Steel Co.*, 301 U.S. 1; *Thomas v. Collins*, 323 U.S. 516. For historical experience, economic necessity, analysis of the nature of unions, the analogy of their function in an industrial society to government in a political society, and legal doctrine from *Commonwealth v. Hunt*, 45 Met. (Mass.) 111, to *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, all indicate that, absent statutory protection of the right of organization and an exclusive bargaining status, union membership as a condition of employment is indispensable to the right of self-organization and the association of workers into unions. Without such recognition of the right of union members to refuse to work with nonmembers, as formalized in a union-shop agreement, there is no way to enforce adherence to the common rules of employment, which is the very basis of unionism, no means of eliminating the competition of the non-union worker, no way of maintaining full equality of bargaining power and of consolidating gains achieved through the process of collective bargaining. It is no happenstance that union membership as a condition of employment is coeval with trade unionism itself, or that today it embraces over 75% of all workers under collective agreements. Destruction of that principle in States where no equivalent statutory framework of protection is afforded means destruction of the right of self-organization itself.

Rights so essential to the preservation of a free society as the right of employees to assemble into and associate together through labor organizations cannot be threatened or impaired by outlawing an indispensable concomitant thereof save under circumstances of overriding and immediate public necessity. No such justification either exists or can be asserted. If it be asserted that protection of an alleged right to work as a non-union member affords justification, the answer is, first, that a hoped for job is not a property right protected under the Constitution, and, in any event, union membership as a condition of employment does not deprive of a right to work in an absolute sense where, as here, membership is open to all qualified applicants; and, second, that the right to work as a non-unionist is in no way equivalent to or the parallel of the right to work as a union member; that there exists no constitutional right to work as a non-unionist on the one hand while the right to maintain employment free from discrimination because of union membership is constitutionally protected. *N.L.R.B. v. Jones & Laughlin Steel Co.*, 301 U.S. 1; *Phelps-Dodge Corporation v. N.L.R.B.*, 313 U.S. 177. Finally, no right to work as a non-unionist can be created and protected by the State where its exercise impairs the exercise by others of fundamental rights of association under the Constitution. If it be asserted that prevention of a "monopoly of labor" allegedly created by union-security agreements affords justification, the answer is that the labor of a human being is not an article of commerce within the usual concept of monopoly restrictions, and that while industry in a free-enterprise society may thrive on competition between business, labor can but die on competition between workers. It is the necessary object of any union to eliminate the competition of non-union workers (*Apex Hosiery Co. v. Leader*, 310 U.S. 469), so that to outlaw this object would be to outlaw the principle of self-organization itself.

Even if rights of contract, protected solely under the Fourteenth Amendment or the contract clause, were alone

deemed affected by the enactments herein, nevertheless the laws must fall as being demonstrably arbitrary, excessive and discriminatory. There is no real basis for the absolute prohibitions in either existing conditions or conditions reasonably to be feared; justifications such as protection of right to work, prevention of monopoly, prevention of strikes and internal abuses by unions under closed-shop contracts, all prove inadequate upon analysis. The prohibitions being without rational basis, they are in violation of the Fourteenth Amendment and the contract clause. *Nebbia v. New York,* 291 U.S. 502; *Wolff Packing Co. v. Court of Industrial Relations,* 262, U.S. 522; *Home Building & Loan Co. v. Blaisdell,* 290 U.S. 398. Whatever abuses may arise by virtue of union-security agreements can and should be reached by regulation and not proscription; considering the nature and function of the union-security principle, total prohibition thereof is entirely incommensurate with any possible public good thereby effected and is therefore an excessive and arbitrary exercise of state police power. *Adams v. Tanner,* 244 U.S. 590; *Weaver v. Palmer Brothers Company,* 270 U. S. 402; *Liggett v. Baldridge,* 278 U.S. 105; *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393. Indeed, total prohibition, far from being in the public interest, is in fact at public expense and solely in the interest of a private few, namely, the non-unionists who desire to enjoy the benefits of collective bargaining without contributing to the costs thereof, and as such is equally repugnant to the Fourteenth Amendment. *Treigle v. Acme Homestead Association,* 297 U.S. 189. If, under the circumstances shown to exist and the justifications advanced, total proscription, as distinguished from regulation, of the union-security principle is not violative of the federal Constitution, then no institution, no enterprise, no activity is safe from legislative abolishment under a claim of public interest. To accord the States leeway in social experimentation is not to sanction license; if any individual freedoms are to remain, the Constitution

must stand as a barrier against gratuitous and entirely unnecessary destruction of traditional activities.

Finally, the total deprivation to union members and union appellants herein of the right to enter into and maintain union-security agreements denies them equal protection of the laws in a number of respects. The Arizona enactment in particular is discriminatory in its prohibition of any alleged discrimination by an employer against an employee because of his non-union membership and its failure to accord the same protection to an employee because of his union membership.

ARGUMENT

I

THE ENACTMENTS HEREIN HAVE THE EFFECT OF UNCONDITIONALLY PROHIBITING, NOT MERELY REGULATING, THE MAKING OF CONTRACTS OR OTHER ARRANGEMENTS FOR UNION MEMBERSHIP AS A CONDITION OF EMPLOYMENT, AND THUS INVOLVE NOT ONLY RIGHTS OF CONTRACT BUT ALSO MORE FUNDAMENTAL RIGHTS PROTECTED UNDER THE FIRST AMENDMENT AS A CONCOMITANT OF THE RIGHT OF ASSEMBLY.

As seen from the statement of cases herein, the States of Arizona, Nebraska and North Carolina have completely outlawed, not merely regulated, the union-security principle. None of the prohibitions against making union-security arrangements is conditioned upon the desires of the parties (including the individual employees) affected thereby, or upon conditions in any particular industry, including the extent to which employees in an industry are organized, or upon the manner in which the union party to the contract may function internally, as in regard to admissions and expulsions or the furnishing of labor or other practices which may affect an employment status under a union-security contract. The prohibition is absolute no matter what the circumstances.

More specifically, in the Arizona case (No. 27, R. 130) the right to enforce agreements (entered into both before and after the effective date of the law) requiring employees to remain union members as a condition of employment has been denied the union party to such contract, and an employer publishing a union newspaper has been denied the right to deny employment to a job applicant on the ground that he is not a member of a labor organization. Furthermore, the mere making of union-security agreements of any type has been prohibited.

In the Nebraska case (No. 47, R. 57) the union has been denied the right to require an employer to discharge an employee under a commitment entered into prior to the law that he would retain in his employment only union members.

In the North Carolina case (No. 34, R. 77) it has been held a criminal offense for a group of building trades unions and an employer to enter into an agreement whereunder the employer would hire only members of the contracting unions.

In these cases it is clear, from the language of the decisions interpreting the law, that employers cannot, with or without formal contract, assent to a union's request to discharge non-union employees, and unions cannot attempt to enforce rules requiring members to work only with fellow members. For the laws in question not only proscribe the making and enforcing of union-security agreements as such, they also prohibit any loss of employment status because of non-membership in a labor organization. Thus, the one method—union membership as a condition of employment—that associations of workingmen, wherever formed, have from the first days of trade union history found not only effective but indispensable for the protection of their organization and the consolidation of their gains has been eliminated, and this without the substitution of an equivalent protection of the basic right of self-organization. None of the states here involved has enacted any statutory scheme similar to the National Labor Relations Act, the Railway Labor Act or the Norris-LaGuardia Act for the protection of labor's fundamental rights; unions in these States must, at least in intrastate industries, rely now as in the past on traditional practices to secure their existence.

In order to determine whether the prohibitions embodied under the laws of Arizona, Nebraska and North Carolina contravene constitutional protections, it is necessary first to determine the nature of the constitutional rights in-

volved and the impact of the prohibitions upon these rights:[2]

Some aspects of the importance and value of the right of labor organizations, or of employees acting collectively through labor organizations, to enter into mutually satisfactory agreements with employers embodying conventional union-security arrangements variously termed "closed shop," "union shop," "preferential shop" or "maintenance of membership"[3] are affirmatively set forth in the record. Thus, the undisputed, expert testimony of the long-time President of the North Carolina State Federation of Labor, a principal union witness in the North Carolina case, discloses that the union-security agreement constitutes the most effective, indeed an indispensable, means of securing and maintaining for union organizations and their members

> "Job security and protection from employer discrimination by removal of motives to discharge or demote because of union activity.
>
> "Equality of bargaining power, with consequent betterment of working conditions by insuring labor a united front in the contest for a fair share of the joint products of capital and labor.
>
> "Protection of working standards by preventing cut-throat wage competition by non-union employees.
>
> "Equality of sacrifice by insuring that all who enjoy union wages and working conditions, achieved through years of struggle and deprivation, share in the costs

[2] An adequate presentation of this aspect of appellants' arguments, as well as of the argument that the prohibitions are arbitrary, discriminatory and without rational basis, requires examination of certain economic data and related factual material of which this Court can take judicial notice, which material has been incorporated in an Economic Brief which appellants have filed along with their principal brief and to which reference will be made when relevant. For the Court's convenience there is also attached to the Economic Brief as "Appendix E" an article entitled *State Legislation Banning Union-Security Agreements: The Due Process Issue and Judicial Self Restraint*, written by Joseph P. Witherspoon, Jr., appearing in the Texas Law Review, Vol. XXVI, for November, 1947, No. 1, page 47. This article contains additional economic material and much helpful legal analysis to which reference will also be made hereafter.

[3] For some standard definitions of the various types of union-security agreements, see Economic Brief, pp. 2-4.

of such benefits as members of the union rather than as 'free riders.'

"An increased measure of union responsibility for their obligations under collective bargaining agreements by providing a means of imposing disciplinary action, and an ability effectively to police collective bargaining agreements to the end of obtaining full compliance on the part of the employees embraced thereunder, it being impossible to secure such full compliance where some employees are not union members and thus not subject to union laws and discipline.

"Elimination of jurisdictional strife by safe-guarding against raids and other disruptive tactics of rival labor organizations.

"And, finally, security and maintenance of organization once it has been achieved thereby promoting labor-management cooperation by eliminating the suspicion and hostility which often characterizes the initial stages of employer recognition and freeing union energies and resources for constructive cooperation rather than defensive sparring." (No. 34, R. 13-14.)

For similar undisputed statements respecting the function of union-security agreements in Arizona, see No. 27, R, 11-13, and in Nebraska see No. 47, R. 7. See also Economic Brief, pp. 19-66.

Another obvious right here involved is that of employers to enter into union-security agreements with labor organizations and to employ or retain in employment such employees as are deemed most conducive to harmonious and productive relationships. That it is very often to the employer's best interests to retain in his employment union members only has been made clear in the record. Mr. Whitaker, employer-defendant in the North Carolina case, stated, without contradiction, in this respect as follows:

"For thirty years I have been engaged in building construction and have dealt with unions during that period.

"Based upon my experience as I know the effects of union security agreements on the economic welfare of North Carolina from the employers' viewpoint, I

have found that union security agreements result in stability of employment relationships, the promotion of harmony and cooperation as between employer and employees, the elimination of strife and discord both within the plant and as between rival labor organizations, the making available of sufficient skilled, competent and experienced artisans through the training of apprentices, the stabilization of employee's compensation by the predetermination of applicable wage rates, all having the effect of and actually resulting in increasing production." (No. 34, R. 14-15.)

For similar statements in the Arizona case see No. 27, R. 19-20, 26-27,[4] and in the Nebraska case No. 47, R. 8.

In the Arizona and Nebraska cases, another right affected by the prohibition is the right to rely on provisions of contracts once they are entered into, protected specifically under Section 10 of Article I of the Constitution providing that no State shall pass any laws impairing the obligations of existing contracts.

From the facts in the instant cases and the decisions of the state courts construing the laws, it is apparent, therefore, that, at a minimum, rights of contract which have many times been held to constitute a liberty or property right protected directly under the Fourteenth Amendment or under the contract clause are here involved. But, as will be shown in the next portion of this brief, the right of associations of workingmen, through the device of the union-security agreement, to seek protection for the existence of their association, to obtain an equality of bargaining power, to remove the competition of non-union labor, to enforce common rules, and to obtain consolidation of their gains involves a great deal more than the bare right to make a contract. It embodies the exercise of a right which all experience has demonstrated is a necessary and indispensable concomitant of the right of workers to assemble into

[4] In the case of the Arizona employer, the importance of the right is strikingly illustrated. There, the employer was a publisher of a labor newspaper which customarily and traditionally employed union members only as a necessary adjunct to the successful operation of its business.

labor organizations in the first place, and without which the right of association would be useless. It embodies the exercise of a traditional basic principle of any union member—that of refusing to work with employees not members of the association as a means of maintaining and improving working rules common to all.

II

STATUTES FLATLY PROHIBITING UNION MEMBERSHIP AS A CONDITION OF EMPLOYMENT IN ANY FORM DENY FUNDAMENTAL RIGHTS IN VIOLATION OF THE GUARANTEES OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

A. The Right to Form Unions and to Carry on Essential Union Activities is an Exercise of The Right of Association Conjointly with the Other Rights Guaranteed by the First Amendment.

In the cases at bar, the right to form and maintain a union is necessarily in issue when an indispensable element of that right—union membership as a condition of employment—is proscribed. That union membership is an indispensable element of the right will be demonstrated in the next portion of this brief. For present purposes, it is necessary to determine the nature and status of the right of workers to form and maintain unions. That we assert to be a fundamental right. It is not a concept of natural justice. Cf. dissenting opinion of Mr. Justice Black in *International Shoe Co. v. Washington*, 326 U.S. 310, 322. It is a specific exercise of the right of assembly. This Court, without specifying the precise right involved, has positively decided that "the right of employees to self-organization is a fundamental right." It is not dependent upon statutory creation, though it may be given statutory protection. *N.L.R.B. v. Jones & Laughlin*, 301 U.S. at 33; *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, at 263. See also *N.L.R.B. v. Budd Manufacturing Co.* (C.C.A. 6) Fed. (2d) , decided August 16, 1948; *Inland Steel Co. v. N.L.R.B.* (C.C.A. 7) Fed. (2d) , decided September 23, 1948.

A fundamental right is one protected by the Constitution. *West Virginia v. Barnette*, 319 U.S. 624, at 638. And the right in the case at bar is an exercise by workmen of the

right to assemble and to petition for redress of grievances in the field of economic interests. It is not a coincidence of language that the complaint of an employee against the denial of the fair application of job rules by the employer is in legal and popular language a "grievance." See *Elgin, Joliet & Eastern R. R. v. Burley*, 325 U.S. 711.

The First Amendment to the Constitution of the United States guarantees the fundamental rights of individuals in a democratic society:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition for the redress of grievances."

By the Fourteenth Amendment, these guarantees are also barriers to any infringement by the State. *West Virginia v. Barnette*, 319 U.S. at 639.

These rights are exercised by workmen when they organize themselves into a union and carry on its essential activities. It has been a long journey, but the constitutional ground for union rights is now firmly secured. Once this point was reached, the confusions of the past were lifted. To reach it required only the recognition that constitutional rights are exercised by people in their everyday affairs. This principle was given full expression in *Thomas v. Collins*, 323 U.S. at 516.

> "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.
>
> "The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity." (323 U.S. at 531.)

There was no disagreement on this principle in the *Thomas* case. Mr. Justice Jackson, who concurred, argued that the principle had not been consistently applied, and

should be extended to include the employers' freedom of speech. The dissenting minority divided only because, in their judgment, a statute requiring registration of union organizers did not prevent freedom of speech and assembly, but merely required identification of those whose vocation included speaking.

The safeguards of the First Amendment were applied in the *Thomas* case to a single union meeting. In the *Hague* case, they had earlier been applied to protect the right to hold a series of meetings to organize unions. In the *Thornhill* and *Carlson* cases (*Thornhill v. Alabama*, 310 U.S. 88, and *Carlson v. California*, 310 U.S. 106) the Court had agreed that "in the circumstances of our times" the guarantee of free speech embraced the peaceful dissemination of "the facts of a labor dispute by a labor organization through peaceful picketing."

Workingmen exercise their right of assembly in a very real and very practical sense when they form unions and participate in their affairs. A union is an assembly of individuals into an association for the government of their common affairs for the improvement of their conditions and advancement of their welfare. It is a continuing and permanent assembly and conducts its affairs in an organized way; it is therefore, usually referred to as an association or an organization; but this form of social action is derived from the primary action of all associations and organizations, the assembly or meeting of a group of individuals to promote their common interests. Indeed, union activities consist, primarily, of a series of meetings of the individual members. It is in either committee meetings, local union meetings or meetings of the national union that common problems of employment are discussed and decisions made. In the meetings grievances are disposed of, subject matters of collective bargaining are determined, working agreements made by union agents are accepted, and matters of local and national policy are decided upon. Labor organizations, like religious organizations and political associations,

are simply groups of individuals gathered and assembled together for the more effective exercise, through joint action, of the constitutional rights to which each individual is entitled and may lawfully exercise.

Thus, it was that this Court, in *N.L.R.B. v. Jones & Laughlin Steel Co.*, 301 U.S. 1, at 33, was able to say that "the right of employees to self-organization is a fundamental right," and, more specifically, to say in *Thomas v. Collins*, supra:

> "Lawful public assemblies, involving no element of grave and immediate danger, to an interest the state is entitled to protect, are not instruments of harm which require previous identification of the speakers. *And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.*" (323 U.S. at 539.) (Emphasis supplied.)

And thus it was that the Sixth and Seventh Circuits have both concurred in the proposition that the right of workers to assemble into labor organizations is a right protected under the First Amendment. *N.L.R.B. v. Budd Manufacturing Co., supra; Inland Steel Co. v. N.L.R.B., supra.*

The true value of this right of workingmen to assemble into labor organizations for purposes of mutual aid and protection is best seen when it is realized that under the Constitution the founding fathers created a society of free men. As applied to workingmen, this concept of freedom, as distinguished from slavery, elevates to the highest constitutional level the right of workingmen to assembly into labor associations. As applied to the right of businessmen to assemble, the concept of freedom has no such implications (see pp. , *infra*). The facts of economic life and the conditions of industry, which made recognition of this right of workers the indispensable prerequisite to the existence of a society dedicated to the ideal of "completely free

and voluntary labor" as opposed to slavery and involuntary servitude, had early been noted in the decisions. In *Holden v. Hardy*, 169 U.S. 366, 397, the Supreme Court observed that individual employees had, as a practical matter, no voice in determining the terms and conditions of their employment. "The employer simply notifies the worker what wages he [is] to get and the hours he [is] to work." The employees, in turn, the court saw, "are practically constrained to obey." By 1921, in *American Steel Foundries v. Tri-City Central Trades & Labor Council*, 257 U.S. 184, 209, the Court observed:

> "A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment."

The fact that employees acting individually and alone are helpless to deal on a basis of equality with their employers concerning the terms and conditions of their employment; the fact that only by organizing for the purpose of collective bargaining can employees obtain a voice in fixing the wages and hours and other conditions of work; the fact that "When the master can compel and the laborers cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work." (*Pollock v. Williams*, 322 U.S. 4, 18), a condition characteristic of a slave, not a free, society; these facts dictated that no government, under the Constitution, could be deemed to have power to preclude employees from combining in labor organizations for the purpose of achieving equality of bargaining power and bargaining collectively with employers.

We believe, therefore, that the right to form and maintain unions is a fundamental right specifically protected under the guarantee of the right of assembly in the First Amend-

ment. The question in this case is whether union membership as a condition of employment is, in the absence of some equivalent statutory protection of the right of union organization, an essential and necessary element of that right. If it is, then it is indispensable to the exercise of the constitutional right to form unions. If it is, then the statutes at bar are unconstitutional abridgments of that right under the principle "You take my house when you do take the prop that does sustain my house; you take my life when you do take the means whereby I live." We propose to prove that it is, by experience, analysis and legal doctrine. When considering such proof, it should be remembered that "In approaching cases, such as this one, in which Federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect." *Oyama v. California*, 332 U.S. 633, 636.

B. Union Membership as a Condition of Employment is Indispensable to the Exercise of the Right of Workmen to Assemble in Union.

1. Proof of Indispensability by Experience and Economic Necessity.

Historical experience demonstrates that the refusal of union members to work with non-members, and the consequent making of union membership a condition of employment, were and are at the heart of workmen's associations.[5]

Constitutional rights are not derived from abstract doctrines but from the concrete experience of our people. The Constitution protects the vital personal liberties necessary to our form of government. Experience is the proof of necessity. If a body of Americans has persistently, in the face of the greatest obstacles, legal, social and economic, remained attached to certain practices in the exercise of

[5] A full account of this history is presented in the Economic Brief of the American Federation of Labor, pp. 5-9.

their freedom, then these practices may claim constitutional protection. We do not say that fixed habits and ways of exercising rights are beyond legislative regulation simply because they are ancient, but that there is in established practice an expression of fundamental right which, though it may be regulated, cannot be destroyed or abridged. *Murdock v. Pennsylvania,* 319 U.S. 105, at 110. This Court decided there that the free distribution of religious leaflets was indispensable to freedom of religion because it was an "age-old" religious practice.

> "The hand distribution of religious tracts is an age-old form of missionary evangelism as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various sects * * * "
>
> "We hold only that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." (319 U.S. at 108, 110.)

Cf. *H. J. Heinz Co. v. N.L.R.B.,* 311 U.S. 514, where this Court relied upon the history of the collective bargaining process and experience under it as showing that the obtaining of a written, signed agreement was indispensable to bona fide collective bargaining.

The refusal to work with non-union employees is "coeval with trade unionism itself." Webb, *Industrial Democracy* (London, 1897) p. 214. Historically, unions were local clubs or societies of workmen who joined in an association and agreed to certain common rules under which the members of the society would offer their services to employers. The crux of the association lay in the elimination of competition among its members. Formerly, unions were outside the law; they did not secure collective agreements from employers, nor were there any statutes protecting collective bargaining. The common rules, governing wages and

conditions of work, were enforced through the disciplinary powers of the association, and in order to make them effective it was obviously necessary that all workmen who could compete with association members should belong to the association. To secure this end, to induce competing workers to join the association, and thereby to protect their society and to enforce its rules, it was the unfailing usage of the society to agree that members would not work with non-members and that they would notify employers accordingly.[6]

We quote from our Economic Brief (pp. 7-11):

> "The Cordwainers of Philadelphia, who set up their first permanent organization in 1794 and other cordwainers' societies at the outset adopted a rule that the employer should retain none but society men in his shop * * * By 1840 it became quite common for unions to adhere to rules whereby any union members were prohibited from working with non-union workers regardless of what wages the latter might be paid. This is illustrated by the following clause in the constitution of the Baltimore Typographical Society of 1842: 'Every person working at the business will be required to make application to join this Society within one month from the time of his commencing work in any office in the city * * * on the refusal or neglect to comply with the regulations contained in the foregoing sections, or in the case of the rejection of the application * * * the members of this Society shall refuse to work in any office where such person may be employed.' * * * In addition to the printers, Dr. Stockton's thorough study lists the following unions which adhered to this practice before the Civil War:
>
> "Journeymen Cordwainers, Journeymen Carpenters, Cigar Makers, Journey Tailors, Hollow Ware Glass Blowers, Iron Molders, Journeymen Hatters, Shoe Makers, Benevolent and Protective Association of United Operative Mule Spinners of

[6] See the collection of early judicial records proving the universality of this usage. E. E. Witte, *Early American Labor Cases*, 35 Yale L. J. 875; Nelles, *Commonwealth v. Hunt*, 32 Col. L. Rev. 1128; Nelles, *The First American Labor Case*, 41 Yale L. J. 165.

New England, Carpet Weavers, Stone Cutters, the Potters, the Iron, Steel and Tin Workers, and the Longshoremen.

"Summing up, Dr. Stockton states: 'If the available evidence is summed up, it may be said that practically every trade union formed prior to the Civil War was in favor of excluding non-members from employment.'"

Thus, unionism in its primitive state of local associations of craftsmen reveals the basic elements necessary to the exercise by free workers of their right to assemble into economic associations. The refusal to work with non-unionists is one of these indispensable elements.

The subsequent history of the American trade union movement has elaborated upon this element but never obscured its essentiality. (See Economic Brief, pp. 4-19.) The first national unions were formed after the Civil War. Beginning about 1870, according to Dr. Stockton: "The National Unions, or a very large part of them made the maintenance of the closed shop a national rule, and required the local organizations to enforce it as effectively as possible." (Cited in Economic Brief at p. 19.)

In these early days, unions did not enjoy the benefit of contracts with employers. The practice was to give the employer notice of the union rule against working with non-unionists. See *Commonwealth v. Hunt*, discussed *infra*. But as contracts came to be executed to avoid disputes, the employer recognized the union rule and agreed to hire only union members. See *Jacobs v. Cohen*, 183 N. Y. 207, 76, N.E. 5. The older the union, the more secure was the provision in the contract with the employer, because the rule of common union membership had been already established prior to the agreement. Old craft unions which, in the course of time, had made union membership a part of learning the trade, as common as the tools of the trade or its work habits, enforced their rule by a "closed-shop" contract with employers. This contract provision obligates the employer to hire through the union or to hire only persons who are, at the time of hiring, union members.

Preferential hiring is a minor variation, requiring the employer to prefer union members. Industrial unions were satisfied to secure a "union-shop" agreement under which the employer is free to hire whom he wishes, but all employees are obliged to become members of the union shortly after hiring, and to remain members in good standing thereafter. During World War II, a new contractual arrangement was devised, namely, maintenance of membership. In this arrangement, an employee is free not to join the union, but if he does, he is to remain a member for the life of the collective agreement between the union and the employer. (See Economic Brief, pp. 1-4, for an explanation of the foregoing terms.)

In one of these four forms—closed shop, preferential hiring, union shop, maintenance of membership—union membership has become a condition of employment for twelve million workers. (See U. S. Dept. of Labor, *Extent of Collective Bargaining and Union Recognition*, 1946, reproduced in No. 34, at R. 51.)

This number represents 75% of all workers covered by union agreements. Idem. Thus, union membership as a condition of employment in some form has been a characteristic, age-old element of union organization; it is today an integral part of our industrial society.

Like the principle of self-organization itself, the principle of union membership as a condition of employment arose out of the necessities of the situation; economic factors induced, indeed compelled, adoption of the principle as an indispensable concomitant, an integral part of effective unionization. As this Court pointed out in *Pollack v. Williams*, 322 U.S. 4, when a single person labors for wages and under conditions which he lacks adequate bargaining power to improve, the "resulting depression of working conditions and living standards affect not only the laborer under the system, but every other with whom his labor comes in competition." So it is with the single non-unionist employed in a shop where the remainder of the employees

are members of the union. The refusal of the non-unionist to lend support to the union's demands, to assist in maintenance of union conditions, to participate in its activities, affects not alone his own working conditions but those of every union member in the plant. The demand of unionists that, as a condition to their employment the employer hire only union members, is not an offensive measure directed at restriction of the liberty of the non-unionist but rather a defensive measure directed at the preservation of equality of bargaining power and attainment of the very objectives which the guarantee of the right to organize is intended to promote. All history and experience teaches that the obtaining of union-security agreements is the only practicable means available to workers for maintaining bargaining power and hence labor standards within single shops or within industries.

This Court has recognized that "in order to render a labor combination at all effective it must eliminate the competition from non-union made goods." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502-504. It is for this and other reasons discussed herein that "A closed shop is the ultimate goal of most union endeavor." Justice Jackson dissenting in *Wallace Corp. v. N.L.R.B.*, 323 U.S. 248, at 267. To deny to those employees who seek to obtain a voice in their industrial life through organization the essential means of making the voice and power of their organization effective, i.e., by requiring common union membership, is to deny them the right to organize itself. Compare Frankfurter and Greene, *The Labor Injunction*, p. 205, where it is stated "• • • the right of combination by workers [for, *inter alia*, union security] is itself a corollary to the dogma of free competition, as a means of equalizing the factors that determine bargaining power • • •."

It is at precisely this point that distinction exists between the protection accorded by the First Amendment's guarantee of freedom of assembly as it applies to business associations on the one hand and to labor organizations on the other. The guarantee of freedom of assembly protects

the right of businessmen to form associations for lawful purposes. But it does not guarantee or protect the right of businessmen to utilize their association for purposes of price fixing or of eliminating competition between business managers. Those purposes need not be deemed lawful because price fixing is not, itself, an objective to which the Constitution lends sanction in a free enterprise society. Business thrives or can thrive under competition between businessmen; workers cannot thrive but can only die under competition between themselves. For workers throughout a trade or industry are, as a group, engaged in competition with businessmen for a fair share of the products of industry. Unless workingmen are free to combine and eliminate competition among themselves, they cannot effectively engage in competition with employers. The objective of our society that labor be free requires that workers be permitted to take collective action necessary to enable them to attempt to improve wages, hours and working conditions. *Pollack v. Williams, supra.* Therefore, the objective of workers to eliminate non-union competition cannot be made unlawful. On the other hand, no constitutional objective exists which requires that businessmen be permitted to combine effectively for the purpose of maximizing profit. Thus, the exercise by workingmen of freedom of assembly, to have real meaning, must comprehend the right to eliminate wage competition between individual employees and to require adherence to the common rule through the device of union membership as a condition of employment, whereas in the case of businessmen it will not include the right to combine to eliminate price competition.

A historical proof of the inseparability of union-security agreements to effective exercise of the right to self-organization is offered by the fact that the attack upon unions always centers on this element. Employer resistance to unions was first organized at the turn of the century and its rallying cry was the "Open Shop." The "open shop" permits the employment of non-union men who are not

bound to work at union terms and through whom the employer can defeat the objective of organized workers to achieve equality of bargaining power by pitting the union and non-union workers against each other. Since the 1900s the attack on unionism has continued to center on this element. During times of national crises, in the First and Second World Wars, when it was necessary to secure the confidence of workers, and when external danger to the Nation enforced a truce to domestic quarrels, the resistance to membership as a common term of employment was reduced. But after the First World War, employers resumed their attack upon the closed shop.[7] Today, the right of workmen's associations to make membership a necessary and common incident of employment is again under attack. The attack this time has taken the form of laws enacted in several States, where, it can fairly be said, union members are a minority of the civil population. The enactment of these laws in several States does not prove their validity; it proves instead that the long uphill struggle of workmen to exercise constitutional rights is not at an end.

Judicial recognition of this indispensability of the union-security principle to the very existence of labor organizations has many times been made. The Supreme Court of Illinois states in *Kemp v. Division* 241, 255 Ill. 213, 99 N.E. 389, at 394:

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[7] It is the plain and demonstrable fact that the open shop means low wages and insecurity for workers, and the union shop high wages and security; there is a direct and positive correlation between the incidence of union shop agreements and wage rates. The results of the great open shop drive of the 1920's in lowering wage rates and eliminating purchasing power, leading directly into the great depression of the '30's, is a classic example. Similar results obtain no matter what the era (Economic Brief, p. 13, et seq.). Available studies in every field, of which the study of the relationship between wage rates and union shop conditions in the coal industry and the indispensability of the union shop in removing the traditional north south wage differential, is the most striking, indicates this close correlation. See Economic Brief, pp. 21-37. Time and again it has been demonstrated, that only through eliminating the wage competition of the non-union workers can wage standards be maintained, and it is only by the use of union security agreements that such elimination can, as a practical matter, be accomplished.

"• • • If it is proper for workmen to organize themselves into such combination as labor unions, it must necessarily follow that it is proper for them to adopt any proper means to preserve that organization. • • • "• • • To deny them the right to determine whether their best interests required that they should be associated in their work only with members of their organization would imperil their very existence." (At 396.)

And in *McKay, et al. v. Union*, 16 Calif. (2d) 311, 106 Pac. (2d) 373, at 381, the California Supreme Court described application of the union-shop principle as follows:

"• • • 'The defendants were seeking, in all they are shown to have done, to secure employment by the plaintiff for themselves, to the exclusion of those not associated with them, and to secure that employment upon terms deemed satisfactory or advantageous to them. That is the effort of every dealer in goods. It is the struggle of competition, and is no more frowned upon where the subject of trade is labor than where it is a specific commodity.' • • •

"The interest of the defendant unions in the present controversy is direct and obvious. The closed union shop is an important means of maintaining the combined bargaining power of the workers. Moreover, advantages secured through collective action redound to the benefit of all employees whether they are members of the union or not, and members may resent non-members sharing in the benefits without liability for the obligations. Hence a closed shop policy is of vital importance in maintaining not only the bargaining power but also the membership of trade unions. These considerations serve to justify the defendants' conduct as much against the complaints of non-member employees as against complaint of an employer."

See also cases set forth in Appendix F to Economic Brief.

The present status of union membership as a condition of employment, its ancient usage, the economic factors giving rise to the institution in the first place, all denote that it is indeed an indispensable constituent of the right of workers to self-organization and deserves equal protection if that right is to be effective.

2. Proof of Indispensability by Analysis of the Nature of Unions and Analogy of Duties of a Worker in an Industrial Unit to Those of a Citizen in a Political Unit.

An analysis of the nature of unions will confirm the fact of experience; that union membership must be permitted to be a term of employment, unless, perhaps, the collective regulation of working conditions is supervised by law. It is the nature and function of unions to establish common rules for the employment of workers in like employments. We have come to call this function "collective bargaining," but collective bargaining is only one phase or aspect of the relationship. Historically, there was a period when unions did not secure contracts, and the common rules were enforced solely through the power of their association.

The need for common rules of employment is not created by unions; it is created by the nature of any economic enterprise which employs a number of individuals in a joint effort. The work of a number of persons must be governed by rules which determine the part of each individual in the joint effort. There is a government of some nature in any economic enterprise. Some work rules have been fixed by the State, such as maximum hours, minimum wages and other measures of health and safety; more rules are fixed by employers; a few by unions alone; and many by negotiation between unions and employers. If the union does not fix or help fix common rules of wages, hours and other working conditions, the employer will and does alone. The employer may wish to vary the rules in his discretion to suit his needs or advantages, but this arbitrary power of variation and discriminatory application of the common rules affronts the sense of justice and spurs men into forming unions. The common rule and its fair and uniform application provide the foundation of law and justice in the relations between employer and employees. Participation by unions in the formulation and administration of the common rules is essential to democracy in economic life.

When the State fixes all the rules, there is no freedom for either employers or employees; the State is then a totalitarian authority excluding any private organizations having powers of self-government. When the employer fixes and administers the rules in his uncontrolled discretion, the employees are like subjects of an absolute monarch.

The individual worker, except in rare cases, does not fix terms of employment to suit himself. He is, almost always, employed under the common rules fixed by the State, the employer or the union.

Because collective bargaining involves transference from each individual worker to the group as a whole of the right to determine the wages, hours and working conditions which shall obtain in the particular employment, and because in collective bargaining the wages, hours and working conditions which obtain apply equally to all who are employed in the enterprise, the rights of the individual worker under collective bargaining become analogous to those of a citizen in a political unit. The worker becomes a member of an economic society when he takes employment. The necessity of viewing the problem of the individual workers in relation to union membership as a problem characteristic of the society of workingmen as a group rather than as a purely individual matter was foreshadowed by Mr. Justice Jackson in his concurring opinion in *Thomas v. Collins*, 323 U.S. 516, at 546. He pointed out that:

> "The necessity for choosing collective bargaining representatives brings the same nature of problem to groups of organizing workmen that our representative democratic processes bring to the nation. Their smaller society, too, must choose between rival leaders and competing policies."

It is the society of his fellow workers in a mine, mill or shop, in a craft or calling. The union is the organization or government of this society, formed by the exercise of the right of association. It is essential to the nature of this organization that it include every individual who is a mem-

ber of the society which it governs. Union membership as a condition of employment is thus itself a common rule of employment, insuring equality and non-discrimination, as does a uniform wage rate or fixed work day. It is, however, unique because it is essential to the maintenance of these other rules. At least in the absence of a statute which protects the common rule, common union membership is indispensable to a democratic society of workers, based on law and justice. When union men, since the days of their pioneer organizations, made the refusal to work with non-unionists a cardinal point in their philosophy, they were responding to the necessities of their situation. Their right to free association is abridged and threatened with destruction when this connection with reality is outlawed.

3. The Proof of Indispensability by Legal Doctrines.

(a) Recognition of the right to self-organization precludes the view that labor organizations, in requiring union membership as a condition of employment, are engaged in unlawful assemblies.

Commonwealth v. Hunt, 45 Met. (Mass.) 111, decided in 1842, is one of the great landmark decisions in American labor law. Nelles, *Commonwealth v. Hunt, supra*. The ruling acquitted unions of the charge that they were an unlawful conspiracy. It is especially relevant here because the gist of the case was the legality of a union rule that members of a society of craftsmen would not work with non-members. The prosecution charged that this rule and its effect as a condition of employment were proof of an unlawful assembly. The defendants, the indictment read,

> "being workmen and journeymen in the art and manual occupation of bootmakers, unlawfully, perniciously and deceitfully designing and intending to continue, keep up, form and unite themselves into an unlawful club, society and combination, and make unlawful by-laws, rules and orders among themselves, and thereby govern themselves and other workmen in said art, and unlawfully and unjustly to extort great sums

of money by means thereof, did unlawfully assemble and meet together, and being so assembled, did then and there unjustly and corruptly combine, confederate and agree together, that none of them should thereafter and none of them would, work for any master or person whatsoever, in the said art, mystery or occupation, who should employ any workman or journeyman, or other person, in the said art, who was not a member of said club, society or combination, after notice given to discharge such workman from the employ of such master; to the great damage and oppression, not only of their said masters employing them in said art and occupation, but also of divers other workmen and journeymen * * * to the evil example of all others in like cases offending, and against the peace and dignity of the Commonwealth." (45 Met. at p. 112-113.)

Chief Justice Shaw characterized this charge:

"Stripped then of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this; that the defendants and others formed themselves into a society and agreed not to work for any person, who should employ any journeyman or other person not a member of such society, after notice given to him to discharge such workman." (45 Met. at p. 128.)

That a union seeks to be all-inclusive is "manifest." The Chief Justice wrote:

"The manifest intent of the association is, to induce all those who engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones." (45 Met. at p. 129.)

It is the abuse of this power which alone may be condemned, not the power itself, the opinion holds. The association and its rule, making union membership a condition of employment, are legal on "established principles":

"* * * that every free man, whether skilled laborer, mechanic, farmer or domestic servant, may work or not work, or work or refuse to work with any company or

individual, at his own option except so far as he is bound by contract." (45 Met. at p. 133.)

The prosecution relied heavily on the fact that the union had procured the discharge of a workman, one Horne, by his master, Wait. This was, the indictment charged, unlawful compulsion upon others. It was not, the Court held:

> "But whatever might be the force of the word 'compel,' unexplained by its connexion, it is disarmed and rendered harmless by the precise statement of the means by which such compulsion was to be effected. It was the agreement not to work for him, by which they compelled Wait to decline employing Horne longer." (45 Met. at p. 133.)

Horne, it will be noted, "had been a member; his troubles with the society seem to have commenced when he did extra work on a pair of boots without charging for it." Nelles, *op. cit., supra,* 32 Yale L. J. at 1132. He was expelled for violating a common rule of the society.

Many years later but still long before the right of self-organization was found to have any constitutional sanction, Justice Holmes, when sitting as a member of the Supreme Judicial Court of Massachusetts, found occasion to especially concur with the reasoning of Chief Justice Shaw in *Commonwealth v. Hunt.* In his dissent in *Vegelahn v. Guntner,* 167 Mass. 92, 44 N.E. 1077, 35 L.R.A. 722, 57 Am. St. Rep. 443 (1896), he restated the principles of the *Hunt* case as follows:

> "One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way . . .
>
> "If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor; just as capital may combine with a view to getting the greatest possible return, it must

be true that, when combined, they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control. I can remember when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion today. I feel pretty confident that they equally will abandon the idea that an organized refusal by workingmen of social intercourse with a man who shall enter their antagonist's employ is wrong, if it is dissociated from any threat of violence, and is made for the sole object of prevailing if possible in a contest with their employer about the rate of wages. The fact, that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist, does not necessarily make it unlawful, any more than when a great house lowers the price of certain goods for the purpose, and with the effect, of driving a smaller antagonist from the business. Indeed, the question seems to me to have been decided as long ago as 1842 by the good sense of Chief Justice Shaw, in *Commonwealth v. Hunt*, 45 Met. 111."

Today, when the right to self-organization is recognized to have constitutional sanction, when the function of labor unions in making and enforcing common rules is deemed indispensable to exercise of that right, when the collective action of workers to improve their material conditions is no longer deemed constitutionally on a parity with collective action of businessmen to fix prices, the decision in *Commonwealth v. Hunt* could be predicated on constitutional as well as common law grounds.

(b) The right to self-organization for purposes of collective bargaining necessarily includes right to enforce common rules of employment as against individual employees.

In modern times, the society of bootmakers involved in *Commonwealth v. Hunt, supra*, is a shoeworkers' union, and it formulates the common rules in collective bargaining

with employers. As has been indicated above, it is inherent in the nature of collective bargaining, and a condition of its success, that the common rule shall govern all individual employments. The National Labor Relations Act, while it supports this view, does not elaborate on its nature; but this Court has done so in a series of decisions. *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332; *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 343; *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678; *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192; *Tunstall v. Brotherhood of Locomotive Engineers*, 323 U.S. 210 (companion to Steele case; *Railway Mail Ass'n v. Corsi;* 326 U.S. 88; *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711, rehearing, 327 U.S. 661.

The analysis which we have endeavored to set out in this portion of our brief is, we think, fully recapitulated in the opinion in *J. I. Case v. N.L.R.B., supra*. In that case, it will be recalled, the employer had entered into individual contracts with each employee. The contracts did not forbid union membership, nor were they, it was conceded, procured through unfair practices by the employer. Subsequent to their execution, a union won an N.L.R.B. election and with it the statutory right to act as exclusive representative of all employees and to bargain collectively with the employer. The latter insisted that it could not make any bargain with the union which in any way altered the individual contracts, and that it would bargain with the union only on matters not covered by these agreements. But the Court held that these individual contracts had no effect, once the majority of the employees had decided in favor of collective bargaining. It was not a matter of contract, the Court explained, but of certain peculiar features of common action by a group of employees:

> "Collective bargaining between employer and representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one

has a job by reason of it and no obligation to any individuals ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. Indeed, in some European countries, contrary to American practice, the terms of a collectively negotiated trade agreement are submitted to a government department and if approved become a governmental regulation ruling employment in the unit.

"After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and, except that he must engage in no unfair labor practice or discrimination,* is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring.

" * * * An employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement, and may not waive any of its benefits, any more than a shipper can contract away the benefits of filed tariffs, the insurer the benefits of standard provisions, or the utility customer the benefit of legally established rates." (321 U.S. at 334-336.)

The Court then went on to explain that there are situations in which individual contracts are operative and gives

*Union membership is not discrimination but a common uniform term like rates.

as examples situations where there is no collective bargaining agreement. But once the void is filled, the individual contracts lose their force.

"Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit, nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. . . . Wherever private contracts conflict with its function, they obviously must yield or the Act would be reduced to a futility . . .

"It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employees otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.

"But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than collective agreement, but we find the mere possibility that such agreements might be made no ground for holding that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where

there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours and expressly leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole * * * The workman is free, if he values his own bargaining portion more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result. We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous. Individual contracts cannot subtract from collective ones * * * We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement * * * But in so doing, the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by the collective agreement." (321 U.S. at 337-339.)

In the case of *Order of R.R. Telegraphers v. Railway Express Agency, supra*, the individual contracts were made after a collective agreement had been reached. The employer, in this case, notified certain of its employees of a new wage rate and requested their consent to it. They gave it under protest, but their union brought action under the Railway Labor Act to set aside these individual contracts and the Court held them invalid, even assuming, it said, that they were voluntarily reached:

"The Company contends that special voluntary individual wage contracts as to rates of pay, rules and

> conditions of employment may validly be made, notwithstanding the existence of a collective agreement, and that the terms of the individual agreements supersede those of the collectively bargained one. If this were true, statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually. • • • *Collective bargaining was not defined by the statute which provided for it, but it has generally been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States. From the first the position of labor with reference to the wage structure of an industry has been much like that of carriers about rate structures.*" (321 US. at 346.) (Emphasis supplied.)

The decision in *Medo Photo Supply Corp. v. N.L.R.B., supra,* reached the same result under the National Labor Relations Act.

The doctrine of these decisions is that the union establishes, through collective bargaining, the common rules which govern *all* employees in a given unit. These common rules prevail over any individual agreements. In *Elgin, Joliet and Eastern R.R. v. Burley, supra,* the Court held that though individual employees each secure vested rights under the common rules, the union sees to their uniform administration and interpretation. The majority in that case held that individual members could choose their own representative in prosecuting an "accrued monetary claim"; the minority held that the union was the exclusive representative for this purpose. But this Court unanimously agreed that there must be a uniform application of the common rules. The majority said:

> "To leave settlements ultimately to the several choices of the members, each according to his own desire without regard to the effect upon the collective interest, would mean that each affected worker would have the right to choose his own terms and to determine the meaning and effect of the collective agreement

for himself. Necessarily, the carrier would be free to join with him in doing so and thus to bargain with each employee for whatever terms its economic power, pitted against his own might induce him to accept. The result would be to make the agreement effective, not to all alike, but according to whatever varied interpretations individual workers, from equally varied motivations, might be willing to accept. To give the collective agent power to make the agreement, but exclude it from any voice whatever in its interpretation would go far toward destroying its uniform application." (325 U.S. at 737, n. 35.)

The minority was emphatic:

"To permit any member of the union to pursue his own interest under a collective agreement undermines the very conception of a collective agreement." (325 U.S. at 758.)

The common rule of collective bargaining carries with it the legal doctrine that the union is the common authority or government of a society of workers. It has in a sense the powers and responsibilities of a government. It must treat all members of the society it governs as if they were members and deal with them fairly under common rules.

That is the decision of this Court in *Steele v. Louisville and Nashville R. Co., supra.* In this case, the union was the statutory bargaining agent of a craft or class under the Railway Labor Act. Negroes were members of the class, though they were denied membership in the union. The union entered into agreements with several carriers assigning jobs to white workers by depriving negroes of their seniority rights secured by prior collective agreements. The State court had held that the union was free to make any bargain, but said this Court:

"We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. • • • Congress has seen

> fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, see *J. I. Case Co. v. Labor Board*, *supra*, but it has also imposed on the representative a corresponding duty . . . to exercise fairly the power conferred upon it. . . . Wherever necessary, to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action." (323 U.S. at 202-204.)

Whether an individual is a member or not, he is bound by the common rules, but the union owes him the duty of fair and equal treatment. It must, this Court said in the Steele case, afford him the opportunity to participate in the formulation of the common rules. It follows that membership is a right as well as a duty. That is the legal doctrine of the *Railway Mail Ass'n v. Corsi*, *supra*, upholding the legality of a state statute prohibiting a union, not from requiring membership, but from denying it on account of race, color or creed:

> "To deny a fellow employee membership because of race, color, or creed, may operate to prevent that employee from having any part in the determination of labor policies to be promoted and adopted in the industry and deprive him of all means of protection from unfair treatment arising out of the fact that the terms imposed by a dominant union apply to all employees, whether union members or not." (326 U.S. at 94.)

We can summarize the nature of union membership as a common condition of employment in an industrial society by again comparing it to citizenship in a political society. Both are compulsory upon individuals. In each case the compulsion is justified because it is assented to by most of the members. Cf. *West Virginia State Board of Education v. Barnette*, 319 U.S. at p. 641. And it has been found by human experience to be indispensable to the preservation

of any society. The liberty of the individual is not the right to license, but participation in a social organization founded upon equality, justice and law. The union is that organization for employees. It is the product of the exercise of their right of assembly, and it is essential to the exercise of their right to secure equality of bargaining power with employers, that membership in the union be a common condition for all who are in fact members of the group governed by the union. To deny labor organizations the right to require adherence to the common rule and to require participation in the making of such common rules through the device of the union-security agreement whereunder union membership is made a condition of employment is to ignore the nature of our industrial society, to disregard the philosophy of the *J. I. Case Co.* case, *supra*, and the related decisions of this Court discussed above, and to destroy the very foundation of modern unionism.

It will be argued that the comparison of unions to governinent hangs upon statutes which empower the majority union to be the exclusive representative of all the employees in a unit. Thus it will be pointed out that the decision in *J. I. Case Co. v. N.L.R.B.* rested upon the National Labor Relations Act; and the *Steele* case upon the Railway Labor Act. But these statutes did not create the right of workers to self-organization for purposes of collective bargaining. They merely gave it statutory protection. *N.L.R.B. v. Jones & Laughlin Steel Company, supra; Amalgamated Utility Employees v. Consolidated Edison Co., supra. Order of Railroad Telegraphers v. Railway Express Agency, supra.* The incidents of the right are precisely the same whether it is being protected against governmental or against private interference. *N.L.R.B. v. Budd Manufacturing Co., supra; Inland Steel Co. v. N.L.R.B., supra.*

It will be further argued that the statutes which protect the right to self-organization do not make union member-

ship a condition of employment; that, on the contrary, this condition was permissive only under the old National Labor Relations Act; it is restricted under the amended National Labor Relations Act, and it has been prohibited altogether under the Railway Labor Act. One answer to this argument is that the statutory scheme protecting the right of organization and granting exclusive representation to the majority union established in these Acts affords at least a near equivalent of union membership as a condition of employment. Under the doctrine of *J. I. Case Co.* every term and condition of employment is governed by the common rules. Under the doctrine of the *Steele* case, each employee must be given an opportunity to participate in the making of the rules. These conditions are the essence of union membership as a condition of employment.

We are not called upon here to weigh the exact equivalence of a statutory scheme and exercise of constitutional rights unaided by statute. Even when the collective agreement is legally enforceable as in New York State, the enforcement of the common rules depends upon the power of union discipline. During the depression years, wage standards of plumbers in New York City were being undercut by certain union journeymen. Several enforcement measures were tried in vain; the union's disciplinary powers proved to be the only effective means of enforcement. *O'Keefe v. Local 463,* 277 N.Y. 300, 14 N. E. (2d) 77.

The original National Labor Relations Act left union membership permissive, as it did the making of other terms, and conditions of employment. Under that Act, union membership became a condition of employment in the course of collective bargaining protected by the Act. The amended Act at least permits a restricted form of union membership as a condition of employment. The Railway Labor Act prohibits an employer from making any change in any

existing condition of employment without negotiation with the exclusive representative of the employees involved. It contains a more comprehensive system for the protection and regulation of common rules than is to be found in either the old or new National Labor Relations Act. Hence, its prohibition of union membership as a condition of employment was accepted by unions in return for its stringent protection of their organizations and common rules.[9] The State statutes before this Court offer no such protection; they flatly prohibit any form of union membership as a condition of employment; and in none of these states is there any statutory protection for union organization or common rules of employment.

These statutes are defended as independent exercises of the powers reserved to the States to deal with labor relations. (See opinion of State Court in *Whitaker v. North Carolina*, No. 34, n. 34, R. 63-64.) Their only connection with federal law is that in so far as they may regulate labor relations affecting interstate commerce, the amended National Labor Relations Act by Section 14 (B) interposes no bar to the exercise of independent state regulation. Moreover, statutes regulate purely local labor relations to which the right of self-organization is just as fundamental and as well protected by the First and Fourteenth Amendments as in the case of labor employment in interstate commerce. The North Carolina case, as the record shows, involves "local building construction and repair." (Ibid. No. 34, Tr. 14.) The Arizona case involves a union-shop agreement with an employer engaged solely in intrastate commerce (No. 27, R. 21).

These statutes, therefore, stand on their own; within their respective states they are the only statutory regulation of the right of workmen to self-organization. It cannot be denied that these statutes trench upon a vital element of

[9] That even this protection has not proved a real substitute for the union-security principle is shown in Economic Brief, pp. 66-80.

union organizations. Union membership as a condition of employment is proved by experience, by the nature of employment, by legal doctrine, to be essential to unions. A statute which flatly prohibits this element seriously and adversely affects the exercise of the right to self-organization. It eliminates (absent protections afforded by such enactments as the Railway Labor Act) the only known means for enforcing the common rule, inherent in any association of workers. It destroys the power of employees to achieve, by collective action, equality of bargaining power with employers. It can be justified only by the existence of a clear and present danger to the public welfare, and not by attempting to recognize or create and protect an alleged right to work as a non-unionist, or by claiming to prevent alleged "monopolies" in labor said to arise from union-shop agreements. The inadequacy of these two principal justifications for the outlawing of the union-security principle will be discussed in the next portion of this brief.

C. The Statutes Prohibiting Union Membership as a Condition of Employment in Any Form Cannot Be Justified as a Protection of an Alleged "Right to Work" or as a Means of Preventing an Alleged "Monopoly of Labor" or on Other Grounds.

These laws, it is said in their support, restore equality between union and non-union workers. An individual has a right not to join a union equal to his right to join. If it is constitutional to prohibit an employer from making non-membership a condition of employment, it is equally constitutional to forbid making membership a condition of employment. In any event, the right to work is a proper subject of state protection. The proponents of the enactments, as did also the courts below, relied heavily on this reasoning. See No. 27, R. 120; No. 34, R. 78; No. 47, R. 57. It is necessary to determine whether these arguments are sound and what are their implications.

1. THE ENACTMENTS HERE INVOLVED DO NOT PROTECT OR CREATE A "RIGHT TO WORK" IN THE ABSTRACT; UNION-SHOP AGREEMENTS DO NOT DENY THE RIGHT TO WORK IN ANY ABSOLUTE SENSE.

Two of the enactments, those of North Carolina (No. 34) and Arizona (No. 27) outlaw union-security agreements under the guise of according protection to the "right to work." But, of course, neither these, nor the Nebraska amendment, either protects or creates any such right. The Constitution, which does not even purport to regulate the conduct of private individuals, imposes no duty upon any private employer to give employment to anyone. Certainly, absent contract, no man has a "right to work" for any specific employer, or at any specific job. As stated by Justice Brandeis in *Senn v. Tile Layers Protective Union*, 301 U.S. 468 at p. 482, "A hoped for job is not property guaranteed by the Constitution, and the diversion of it to a competitor is not an invasion of a constitutional right." Nor has it yet been held that the States are, by the Constitution, required to provide employment opportunities for all who are willing and desire to work. No such rights are created by the enactments in question. These laws do not require any person to employ anyone. No employee is guaranteed any job, much less any specific job. Nor are these laws concerned with expansion of employment opportunities for workers as a group, or for workers possessing any particular skills. These laws do not undertake to deal with any practices by either employers or by labor organizations which restrict the number of employees in industry. They apply despite the fact that the same number of jobs are and will be available to qualified applicants under these laws, as were available prior to their enactment.

Indeed, in so far as at least two of the cases presently before this Court are concerned, the laws apply regardless of whether all of the employees covered by the union-shop contract in question may have voluntarily agreed to such contract and to maintain union membership during its

term. In the Nebraska case the agreement requiring union membership had in part been approved by a unanimous vote of the group (No. 47, R. 11).

In the North Carolina case, the employer had been engaged in the business of local building construction and repair for thirty years (No. 34, R. 14) and he had always been a "union contractor * * * employing nothing but union labor" (No. 34, R. 9). There was no showing that persons had ever sought employment from Whitaker unless he was a member of the union. It was testified that every prospective employee knew of this condition (No. 34, R. 10), and so far as appears from the record, this was accepted as one of the common conditions of employment with Whitaker.

These statutes are thus being applied to situations where the contractual condition that each employee shall be a union member is a rule agreed to by the workers involved; no one has been "forced" to join a union as a condition of employment.[10]

Nor can there even be pretense that the enactments are directed at the hypothetical situations in which qualified and willing applicants are denied the opportunity to become union members by virtue or arbitrary or unreasonable membership qualifications or excessive initiation fees. For these laws apply regardless whether, as in these cases, membership in the union is open to all applicants on reasonable terms; or not.[11]

Since opportunity to accept or continue employment in enterprises covered by closed-shop contracts is denied only

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[10] It is extremely interesting to note with respect to the oft repeated contention that, under union-security agreements, workers are forced to join unions, that experience in the holding of union-shop elections under Section 9(e) of the Taft-Hartley Act shows that workers voted for a union-shop agreement in 97% of all elections and by a 93.5% majority. See *Monthly Statistical Summary*, National Labor Relations Board, August 1947-September 1948, inclusive.

[11] We are, therefore, not concerned in this case with statutes which, by regulating union admission or expulsion rules and practices, seek to protect the right of employes to join labor organizations. See *infra*, p. 103.

to those who voluntarily choose to refuse to join the union, it cannot be said that these contracts impinge upon the right to work in any absolute sense. Where the enjoyment of rights is conditioned upon compliance with reasonable conditions, individuals who voluntarily refuse to comply with such conditions are not being deprived of those rights. *National Maritime Union v. Herzog*, 334 U.S. 854. A situation parallel to that existing under closed-shop contracts is that which exists in States which have adopted the system of an integrated bar, under which membership is a condition to employment as attorneys. In rejecting the contention that to condition the right to practice law upon membership in the integrated bar is to deny the right to practice law itself, the Supreme Court of Wisconsin stated:

> "* * * assuming that failure to pay dues as prescribed by the order operates to suspend an attorney's membership in the association, his delinquency is the cause of his suspension. He may comply with the order and continue his practice of the law at any time he chooses. Membership in most associations is made dependent upon compliance with the conditions of membership which usually include the payment of a small fee * * * No lawyer will be or can be suspended except as a consequence of his own delinquency." *(Integration of Bar Case,* 244 Wis. 8, 11 N.W. (2) 604 at 620, 151 A.L.R. 586.)

A United States Industrial Commission recognized many years ago that a similar principle is applicable with respect to closed-shop agreements. It said:

> "If the union is willing to receive any competent person into its ranks, no man can complain of being absolutely deprived of work because union men refuse to work with him so long as he fails to join the organization." (Final Report of the Industrial Commission (1902), Vol. XIX, p. 817, H. Doc. No. 380, 57 Cong. 1st Sess. (1901-02).)

What the States have done in these cases is to decree that the condition imposed upon employment in particular enter-

prises by closed-shop contracts, i.e., union membership, is *per se* unreasonable. But to so single out one condition and condemn it as unreasonable is not to protect the opportunity to secure employment or the right to work as such. The State's declaration of "unreasonableness" must, therefore, turn on an appraisal of the interests affected by the presence of the condition and by its abolition, and it is in the light of these considerations that the validity of the enactments must be judged.

2. The Right to Refuse to Join a Union Is Not the Constitutional Parallel of the Right to Join Labor Organizations.

Since, as we have indicated above, the objective of these amendments cannot be to protect the "right to work" as such, or in the abstract; it must be to protect an alleged right of employees to refuse to become or remain members of labor organizations. The state courts below have in effect conceded in their opinions that the objective of the enactments is to protect what they and the sponsors of the enactments conceive to be the right of employees to refuse to join a union—the right to work as a non-unionist with no obligation to adhere to the common rule of his fellow workers.[12] And, in seeking support for state authority to so protect that alleged right, the courts, as do political sponsors of anti-closed shop legislation, purported to find analogy in legislation which, to protect the right to join labor organizations, prohibit employers from discriminatorily denying employment to union members. Thus the Supreme Court of North Carolina stated in its opinion:

[12] It should be noted, parenthetically and apropos the *bona fides* of a claim that a right to work as a non-unionist is the primary object of the legislation, that the anti closed shop laws make no distinction between types of union security agreements, but include, under the broad prohibition, all provisions requiring membership in the union as a condition of employment. Thus, there are included maintenance of membership agreements under which employees have from fifteen to thirty days to decide whether they wish to become union members, and those who decide not to join may continue to work as non unionists for the remainder of the term.

> "If the State may say to the employer, 'you cannot deny work to anyone because of his membership in a union,' we think it follows *a fortiori* that the state may say to the parties 'you cannot deny work to anyone because he is not a member of a union,'" (The Nebraska Court made the same argument (No. 47, R. 57).)

Only verbal parallelism between the "right to join a labor organization" and the "right not to join" lends color to the contention that constitutional sanction extends impartially to both and that the state may therefore protect the one as it may protect the other. But to rest content with a delusive verbal parallelism, as did the state courts below, amounts to abnegation of the judicial function. "Such oversimplification, so handy in political debate" here as in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 636, "lacks the precision necessary to postulates of judicial reasoning."

As Judge Charles E. Wyzanski, Jr., pointed out in his article "*The Open Window and the Open Door*," 35 Calif. L. Rev. 336, 350:

> "The issue of the 'open shop' turns on the right of men in particular employments *not* to join an organization. Despite verbal similarities, 'the right not to join' is not the precise practical converse of 'the right to join.' And the history and implication as well as the values of the two asserted rights are best considered separately."

Only in the light of the reasons for and the scope of the right to join labor organizations can there be meaningful discussion of the so-called right of employees in a particular employment not to join the labor organization to which their co-workers adhere. As we have seen in the discussion earlier, the existence of the constitutional right to form and join labor organizations for the purpose of collective bargaining is attributable, in large part, to the necessity of permitting workingmen to achieve equality of bargaining power with employers and to participate

effectively in determining the common conditions under which they work. The purpose of the guarantee of the right to join labor organizations is served by the exercise of the right—its purpose is not served by the failure to exercise it. Just as a man cannot be said to be exercising a corollary of the right not to be compelled to give self-incriminating testimony by voluntarily testifying against himself, so a man cannot be said to be exercising a corollary of the right to join labor organizations by refusing to join.

If refusal by employees to join a labor organization had no effect upon the effective exercise by others of their constitutional right to join and maintain labor organizations, it might be said that the right to refuse to join, though not a corollary of the right to join, finds constitutional sanction in general considerations of freedom of choice which are not without independent value in our society. But it goes without saying that our Constitution does not guarantee any individual liberty which in practice results in frustration of the constitutional rights of others. We have seen that refusal by some employees to join a union deprives others of their opportunity to achieve equality of bargaining power with employers and thus frustrates the exercise by them of their constitutional right to form labor organizations. To hold that nevertheless these employees have a constitutional right to refuse to join a labor organization, a right which the States may protect against the otherwise lawful conduct of union members and employers aimed at inducing them to join, is to hold that the Constitution, which guarantees the right to effective self-organization as an antidote to slavery, subverts that guarantee in the name of the individual worker's liberty.

Of course, if the union membership or non-membership of other employees were, like the fact of their race or religion, a factor irrelevant to the legitimate interests of the union members, it could be said that the action of union members in conditioning their services upon agreement by the employer to hire only union members not only need

not be sanctioned by the State but cannot constitutionally be supported by the exercise of state authority. The fact is, however, as we have seen, that the union membership of each person hired is of the most vital concern to the legitimate interests of the labor organization of which employees are members. Each non-unionist hired is a threat to the effectiveness of the organization in dealing collectively with the employer; the presence of even one non-unionist in a shop reflects itself directly in loss of union power to better and maintain wages, hours and working conditions—the common rules of employment.

Nor, from the point of view of the employer, is the agreement to employ only union members irrelevant to legitimate business purposes. In the first place, since employees clearly have a constitutional right to refuse to work with others who are not members of their union, the employer's agreement to hire only union men may be indispensable to the securing of an adequate work force. In the second place, since employees clearly have a constitutional right to purchase goods only from those employers who hire union members exclusively, and many exercise that right through the union label device, the employer's agreement to hire only union members may be necessary to secure an expanded market for his products. Finally, because of the standard of competence insisted upon as conditions of membership by many labor organizations, employers may desire to enter into such agreements as a means of assuring that only competent workers will be employed.

On the other hand, the employer who makes union nonmembership a condition of employment, as this Court said in the *Jones & Laughlin* case, *supra*, is not only interfering with the fundamental right of his employees to self-organization but also is protecting no legitimate interest of his own. It is not a part of his right to prevent his employees from achieving equality of bargaining power with him; it is rather an abuse of his power and a denial of the employee's rights.

The "right" to refuse to join a union stands, at best, on no higher constitutional plane than the "right" of workers to bargain individually with their employers. Yet that "right," as we have seen (see pp. 51-61, *supra*), may be extinguished by government as an incident to the protection of the basic constitutional right of employees to bargain collectively. It is obvious, of course, that decisions like that in *J. I. Case, Medo* and *Order of Railroad Telegraphers* could not have been made if the right of the individual to bargain the terms of his employment were deemed constitutionally on a parity with the right of the employees as a group to bargain collectively and bind by their agreement all employees of the employer, including individuals who have not authorized the union to negotiate for them. To be compelled to choose between working on terms negotiated by another whom the employee has not designated as his representative, or not working in the plant at all, is certainly as great a deprivation of freedom as is the compulsion to choose between joining the union and not working at the plant, which is the choice available to employees under closed-shop contracts.

3. The State Cannot Create a Right Not to Join a Union Where Protection of Such Right Involves Denial to Labor Organizations of the Right to Insist on Union Membership as a Condition of Employment.

The analogy between the right to bargain individually and the right to work as a non-unionist, and the fundamental difference between a right to work as a unionist and the right to work as a non-unionist, discussed above, likewise affords the answer to the possible claim of the States, that although the right to work as a non-unionist may not have a constitutional status, nevertheless it is within state power to create such a right and to protect it against infringement. Such an argument would mean that those employees who value their own bargaining position

more than that of the group as a whole could be empowered by law to destroy the effective exercise by the entire group of their constitutional right to organize for purposes of collective bargaining. "The effect is not merely one of minority protection. It is also one of majority prohibition." *United States of America v. Congress of Industrial Organizations*, 335 U.S. 106, Mr. Justice Rutledge concurring. See also *DeMille v. American Federation of Radio Artists*, 187 Pac. (2d) 769 (Calif. Appeals, 1947), aff'd 31 Cal. (2d) 137, cert. denied, 333 U.S. 876; *Bowe v. Commonwealth*, 320 Mass. 230, 69 N.E. (2) 115.

The crux of the matter is that the constitutional right to self-organization is premised upon the necessity of unanimous group action—adherence to the common rule—by workers in negotiating and bargaining with employers concerning the terms of their employment as the alternative to virtual slavery in our society. The implications of that right cannot be understood if the workers in a single shop or industry are viewed solely as individuals, and not as members of the entire group. In determining whether to join and be represented by a labor organization, the group must choose whether to become organized society whose voice shall be heard through a single representative speaking for all, a society in which all must participate to obtain the benefits of unified dealing with the employer and in which a measure of individual liberty must be sacrificed for the welfare of the society, or whether as among them anarchy shall continue to exist. Once again we revert to the close analogy between the duties of workers in an industrial society and the duties of citizens in a political society in support of the contention we are here advancing. The analogy to the formation of civil government by the consent of the participants, but over the objection of the dissenters who may escape participation in the society only at the price of leaving the territorial jurisdiction of its government, is directly applicable. In the absence of statutory protection of the common rules of the union organization,

the legal power of an individual not to join a union gives the individual the power to destroy the society to which he in fact belongs.

In its opinion, the Nebraska Court said its state statute made each individual

> "* * * free 'to associate with his fellows' in a union entirely upon its merits, or 'to decline to associate with his fellows' without imperiling his right either to obtain employment or to continue therein after having obtained it." *(Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., et al.,* No. 47, R. 57.)

In this dictum, ordinary words reveal one real meaning of legal terms. An individual employee, by taking and holding employment, joins a society of his fellow-workers. He is not, by the nature of his relationship, "free to associate or disassociate with his fellows." He is, inevitably, inherently a fellow of their society. The statutes at bar purport to free him of the common rules, of their fair and equal application, in order to protect his individual liberty. But liberty is not the right to be free of an organized society. This Court has said:

> "* * * the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." *(West Coast Hotel Co. v. Parrish,* 300 U.S. 379, at 391.)

In *Nebbia v. New York*, 291 U.S. 502, at 523, this Court restated the principle of liberty in a society:

> "* * * government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm."

Of course, democratic governments themselves may come into being only at the will of a majority of the people. So,

the infusion of deep rooted democratic concepts into the right to self-organization may dictate that the right to form industrial government, in which all employees must participate as a condition of employment, need extend only where a majority of the employees have joined a labor organization. But this limitation is without application here, for these laws apply to prohibit absolutely closed-shop contracts even where all of the employees are members of the union. They decree that for industrial society, unlike our political society, there shall never—and under any circumstances—be recognized the right of the majority to rule. In no instances shall individuals who seek to live and work in industrial society be deemed to have obligations to other individuals in the group or to the group itself. "The accepted principle of majority rule which has become a bulwark, indeed perhaps the leading characteristic of collective activities is rejected in favor of atomized individual rule and action." (*United States of America v. Congress of Industrial Organization*, 335 U.S., at 147, Opinion of Mr. Justice Rutledge.) Just as democratic society could not survive in our political life under such a rule, so the constitutional right to self-organization cannot survive it.

We are here asserting simply that no law which absolutely prohibits the making and performance of union-security contracts can stand, at least in the absence of a showing, not even attempted here, that pressing public necessity demands their abolition. We say that the power to enter into such contracts may not be abridged by the States, as it has been in these cases, on the plea that abolition is necessary to protect a non-existent right to work as a non-unionist. We say that just as a state may not make the right to be a slave a cornerstone of its legislative policy, so may it not make the right to work as a non-unionist a cornerstone of legislative policy. We say that when the state ties the hands of organized workingmen and prevents them from making contracts which are essential to the preservation of their organizations and their standard of

living, it cannot justify its conduct on the ground that outlawry is necessary to protect the right of other employees to destroy the efficacy of their organizations and threaten their standard of living by remaining outside the organization. This is not legislation in the public interest—this is an undermining of constitutional guarantees. To shield non-unionists from the competition of union members which might induce them to join the union, is to create a monopoly for servitude in the name of freedom. The forces in our society which seek to make the ideal of free and voluntary labor a reality may not be subjected to such shackles.

4. The Enactments Cannot Be Justified as Protecting Against an Alleged Monopoly Achieved by Union-Security Agreement.

Closely related to the charge that the union shop invades the right to work as a non-unionist, discussed in the preceding section, is the charge that the union shop creates or attempts to create some sort of a monopoly or restraint of trade, presumably in job or work opportunities.[13] Thus, the North Carolina statute specifically put these contracts in this category and subjects those who enter into them to the criminal penalties for violating the prohibitions against restraints of trade and monopolies. *Whitaker v. North Carolina*, No. 34, R. 57-58.

It is apparent that no monopoly or trade restraint in the usual or legal sense can be intended because no control over a market in commercial goods could be accomplished by virtue of a requirement of union membership as a condition of employment, and whatever restraint exists is not by producers of goods. As used by this Court and heretofore by state courts when referring to the term "monopoly" or "restraint of trade," such terms embrace at the mini-

13 That there exists in fact no sort of monopoly or restraint of trade in jobs in either Arizona, Nebraska or North Carolina is clear from the record. In each of these States only a very minor portion of each trade or industry is employed under union shop conditions (No. 27, R. 17; No. 47, R. 7; No. 34, R. 13, 17-21).

mum some relationship to the power by a producer to fix prices or control markets of commercial goods. See *American Tobacco Co. v. United States*, 221 U.S. 106; Economic Brief, App. E, p. 31. Furthermore, labor is not an article or commodity of commerce; labor organizations are associations of men constituted for purposes of self-protection, not for making a profit. But apart from human values and the distinction between goods and personal services, there is a truly economic distinction between business combinations and unions of workmen. Business organizations can, and by law should, thrive on competition. Competition is based on differences in price, quality or other elements of trade. But, as we have seen, unions cannot exist without the common rule; in this respect they are like carriers, utilities and standard insurers. *J. I. Case Co. v. N.L.R.B.*, *supra*; *Order of R.R. Telegraphers v. Railway Express Agency*, *supra*.

Accordingly, the proponents of anti-union-shop laws who assert existence of a monopoly as a justification must refer to some other sort of monopoly or restraint of trade than that usually employed under the term, and the reference must be to any attempt to eliminate competition of non-union workers. But this objective we have seen to be the natural and inevitable objective of any national labor organization—an objective justified not only on social and economic grounds but also on constitutional grounds. See *Apex Hosiery v. Leader*, *supra*. The attempt by unions to place all business units in an industry on the same footing, in so far as wage rates are concerned, is universal; however, as observed by Mr. Justice Holmes in *Payne Lumber Co. v. Neal*, 244 U.S. 459, at 471, such attempt had "no tendency to produce monopoly of manufacture * * * since the more successful it is the more competitors are introduced into the trade." If the elimination of competition of non-union workers constitutes restraint of trade, or the extent to which it is successful creates some sort of monopoly, both of which the State has power to prevent, then

for the same reasons similiar justifications would be available to outlaw the very principle of self-organization and collective bargaining, at least to the extent that such organization was successful and extended to any appreciable portion of a trade or industry. *I. J. Case Co. v. N.L.R.B., supra; Order of Railroad Telegraphers v. Railway Express Agency, supra; Apex Hosiery Co. v. Leader, supra.* What the States of Arizona, Nebraska and North Carolina are really saying is that they do not object to self-organization of employees as long as it is not successful and as long as no effective means of accomplishing or maintaining organization are adopted. Certainly, as pointed out in the preceding section, such an asserted justification is objectionable both on the grounds that basic constitutional rights are thereby subverted and on the grounds that no possible public interest could thereby be served.

5. The Enactments Cannot Be Justified as Mere Regulation of Contracts.

The fact that a contract device is utilized to effectuate the desired end—adherence to the common rule—does not detract from the fundamental nature of the right here asserted. The contract serves merely to formalize the exercise of the constitutional right; it embodies employer recognition of the right. Further, such a contract is, in effect, a device for assuring that for its term union members will not be impelled to leave work by virtue of the employment of a non-unionist. Such assurance is, in fact, indispensable to modern collective bargaining, for without it workers could not, without imperiling their organizations, and their bargaining power, waive for any fixed period their right to strike. Absent such an agreement, an employer who wished to assure continuity of his work force would simply not hire non-unionists. Formalization of this practice by agreement provides necessary assurance to workers that their income for a period will not be imperiled by the need for leaving work if a non-unionist is hired.

It should be noted that the making of an agreement between an employer and a labor organization governing terms and conditions of employment in the enterprise is not, of itself, an unlawful act. The power to make such agreements is today a necessary part of the right to self-organization. See *H. J. Heinz Co. v. N.L.R.B., supra*. The issue in these cases, then, is not whether union membership may be made a condition of employment by unlawful means, but whether union membership, as a condition of employment, may be made unlawful when secured by lawful means.

It is no answer to all of this to say, as did the courts below, that freedom of contract is not absolute, and may be limited in the public interest. Here the right to execute and to insist upon performance of a contract to employ only union members is not valuable merely as an incident to freedom of contract itself. Rather these specific types of contracts are products of the right to freedom of assembly which is specifically guaranteed by the Constitution and may not be abridged. Obviously, many contractual arrangements are made by persons engaged in the exercise of rights guaranteed by the First Amendment. For example, a contract for printing a leaflet is indispensable to the exercise of the right; the making of such contracts cannot be prohibited under the guise of regulating contracts.

Further, these statutes cannot be justified as a regulation of contracts because they not only prohibit contracts which make union membership a condition of employment; they also each contain a separate prohibition "that no person shall be denied employment because of non-membership in a union." Hence the statutes necessarily prohibit the operation of a union rule against working with non-members. Such a rule is expressly set forth in the Carpenters' Constitution involved in the Arizona case (No. 27, R. 14).[14]

[14] Even when it is not expressly set forth, it may exist by custom. In a Massachusetts case, a union member was held to have been properly disciplined for working with non members, though the rule was not expressly stated in his union's constitution, it was, however, proved to be universal and well known to all persons in the craft. *Clark v. Morgan*, 271 Mass. 164, 172 N.E. 790.

The refusal of union men to work with non-members necessarily means that the employer who wishes the services of union men must refuse to employ non-union workers. If it is not in the contract, the union will notify the employer of its rule, and will enforce it by quitting in a body if the employer forces a non-union employee upon their society. The employer will then choose, and if he discharges the non-union employee in order to retain union members, he has made union membership a condition of employment. He has, in the words of the statutes, "denied employment to a person because of non-membership in a union." Yet, clearly, his action was the direct result of the union members' refusal to work with a non-member. *Commonwealth v. Hunt, supra.*

D. Since Fundamental Rights Finding Protection Under the First Amendment Are Here Involved, the State May Not Support the Prohibitions by Showing of Some Rational Basis in Exercise of Police Power.

It is asserted that, in the end, the justification for these statutes is that the legislature decided that it was necessary, in the public interest, to prohibit union membership as a condition of employment. The legislative determination is conclusive, it is said, because it is a regulation within the reserved powers of the States in our federal system. This reserved power includes the great reservoir of police power which a state legislature may exercise to protect the public interest. The statutes are regarded as regulations of conflicting private interests in industrial relations and hence within "the power of the State to set limits of permissible conflict open to industrial combatants." With much emphasis, the state courts note that similar legislation has been enacted in sixteen states by constitutional amendment or statute: Arkansas, Arizona, Delaware, Florida, Georgia, Iowa, Louisiana, Maryland, Maine, Nebraska, South Dakota, Tennessee, Texas, Virginia. Both the North Carolina and Arizona Courts urge:

"Great weight must be attached to the fact that so many separate jurisdictions have, within a short space of time, seen fit to exercise their police power in the same manner and for the same purposes. The composite will of such a broad cross-section of our country cannot be lightly discarded as unreasonable, arbitrary or capricious or lacking in substantial relationship to its objective. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and wide-spread and has been reached after deliberation." (No. 34, R. 75; No. 27, 125; No. 47, R. 73.)

But popular sentiment cannot abridge constitutional rights.

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (*West Virginia v. Barnette*, 319 U.S. 624, at 638.)

The passage of these laws in sixteen States might be impressive if the States were a composite, broad cross-section of the country, if the statutes were passed after deliberation. But the sixteen States are, however much they differ in other respects, with respect to labor relations very much alike. They are non-industrial states where unions are a minority group. The "deliberation" was an argument of prejudices, opinions and fallacious parallelisms. The statutes are the product of a single common misconception of union-employer-employee relations, namely, that the union "interferes" with the "natural" relations between employer and employees. In this view, it seems quite natural for the employer to fix the condi

tions of employment to which all persons seeking or holding employment with him must submit. It is *his* business. But that workmen should impose conditions upon those with whom they will spend a working day seems outrageous. That a man must join a union before he can get a job seems to be an arrogation of power by union officials. This conception of unions is further alarmed by the realization that union power leads to uniform working conditions in a given occupation or industry. In this view, the abuse of union power is easily observed; individuals are excluded from job opportunities by union restrictions upon entry into a craft; persons are forced to pay dues to unions; a worker is expelled from a union and thereby loses his job.

For all these alleged evils, there is a single remedy; outlaw union membership as a condition of employment and leave each individual free to seek his own terms and conditions of employment. If he wishes to join a union and secure common terms, that is his right; if he does not, and wishes to exercise his individual right to work on the best terms he can get, that is also his right. This action, say the state courts, does not impair any constitutional rights of unions or of union members; "labor's basic rights to organize into a union, bargain collectively, to strike and peaceably picket are not abridged." *American Federation of Labor v. American Sash & Door Co.*, (Ariz.) No. 27, R. 132.

This judgment of the state courts is counter to the philosophy and experience of unions which have held and practiced the belief that union membership as a condition of employment is indispensable to the existence of union organizations.

The applellants assert that fundamental constitutional rights have been impaired by the statutes at bar. The States say that the statutes are regulations in the public interest. It is for this Court to decide the issue

"That the State has power to regulate unions with a view to protecting the public interest [is] * * * hardly to be doubted.

"They cannot claim immunity from regulation. Such regulation, however, whether aimed at fraud or other abuses, must not trespass upon the domains set apart for free speech and free assembly." (*Thomas v. Collins*, 323 U.S. 516, at 532.)

E. The Prohibitions Can Be Supported Only by a Showing of Compelling Public Necessity under the Clear and Present Danger Test; Such a Showing Is Not Even Attempted.

Since union membership as a condition of employment is indispensable to the right of workmen to achieve equality of bargaining power and to exercise through unions their freedoms of assembly, the statutes at bar are clearly unconstitutional. They are not regulations of common union membership, but they prohibit any form of common membership. The fact that "a closed shop and a closed union" may lead to abuses is not sufficient to justify prohibition. When the exercise of a constitutional right is accompanied by abuses of the right, the legislature may suppress the abuse, but not the exercise of the right itself. *Thomas v. Collins*, 323 U.S. 516, at 547; *DeJonge v. Oregon*, 299 U.S. 353, at 364; *Murdock v. Pennsylvania*, 319 U.S. 105, at 116; *Lovell v. Griffin*, 303 U.S. 444, at 451; *Chaplinsky v. New Hampshire*, 315 U.S. 568, at 573; *Schneider v. State*, 308 U.S. 147, at 160-161.

Free assembly, like free speech, can be curbed only where its exercise has created a clear and present danger of harm to the State.

"Any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." (*Thomas v. Collins*, 323 U.S. at 530.)

It must be borne in mind that, since fundamental rights, as distinguished from property right, are here involved,

"Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill v. Alabama*, 310 U.S. at 95. See also *West Virginia v. Barnette*, 319 U.S. at 638.

There is no showing in this case of any clear and present danger. The theory of the statutes is, as we have pointed out above, simple: Union membership as a condition of employment is not protected by constitutional guarantees in any way, and it can be flatly prohibited. In each of the cases at bar the State made no attempt to prove that the particular union-membership agreement involved had been in any way oppressive or arbitrary. The issue is most clearly drawn by *Whitaker v. North Carolina*, No. 34. That case is a criminal conviction of an employer and several union officials. The proof by the State is confined to a single fact: That the employer and the union knowingly executed an agreement that the employer agrees to employ none but union members (No. 34, R. 8-10; State's Exhibit No. 1, 10-12).

That this contract is an evil is imputed to it by the statute. Thus, the indictment in the *Whitaker* case charges that the defendant labor unions

> "• • • did unlawfully and wilfully enter into an illegal combination or conspiracy in restraint of the right to work and of trade or commerce in the State of North Carolina, by executing a written agreement or contract by and between said employer and said labor unions and organizations or combinations, whereby persons not members of said unions or organizations are denied the right to work for said employer contrary to the form and statutes in such cases made and provided and against the peace and dignity of the State." (No. Car. R. 3.)

We are back to 1840. This is the same charge made by the prosecution in *Commonwealth v. Hunt, supra*. Stripped of its verbiage, the charge is that union members, having notified the employer that they would not work with persons who were not members of their society, secured an agreement from the employer that he would hire only union members.

The Massachusetts Court held 106 years ago that this agreement was lawful on "principle." It is now for this Court to say that, in the circumstances of our times, the principle involved is a constitutional one.

The promise of *Commonwealth v. Hunt* was not kept because, though the principle was conceded, its application in specific cases hurt either non-union members or employers, and so it was held unlawful. But these decisions were based upon doctrines of master and servant, restraint of trade and justifiable and non-justifiable tort. These doctrines were ignorant of the experience of union men; their premises excluded the idea of the common rule; and they had to be abandoned when legal doctrine accepted the principles of collective bargaining and the constitutional status of the right of self-organization.

The decision by Chief Justice Shaw in *Commonwealth v. Hunt* required judicial statesmanship of a very high order. He had to relate his decision to the vital forces in the society of his time, Nelles, *Commonwealth v. Hunt*, 32 Col. Law Rev. at p. 1159. This Court has the same task and responsibility. It must apply the great principles of the Constitution to the developments of a modern society. It must intervene in an important conflict of interest between citizens of the United States. It must say where the line is between the exercise of private right and public regulation. We do not ask this Court to grant unrestricted liberty of action; we do not ask it to render the States impotent to correct abuse of rights. We ask this Court to hold only that the right of workmen to refuse to work with persons who are not members of their union is an

age-old practice of unions and essential to the exercise of their fundamental right to form unions; that a state law which broadly and flatly prohibits union members from making union membership a condition of the common employment of themselves and others prevents this practice and abridges the right of workmen to form unions. Such a decision safeguards constitutional liberties, while leaving the State with ample power to regulate and prevent any evils which may flow from the abuse of this right. We do not ask this Court to establish a new principle or a novel right; we ask only for the recognition of constitutional rights that have long been exercised by workmen in their associations and assemblies as they sought to establish a common rule for the guarantee of equality and law in their everyday affairs.

In the practical world the value of membership in an organization stems largely from the fact that the benefits achieved through association may be and are restricted by the group to its members. Where such restriction has been deemed to give rise to evils within the appropriate area of state control, it has uniformly been held appropriate to eliminate the evils only by prying open the doors of membership to all who wish to join rather than by depriving the association of its reason for existence by prohibiting it from excluding non-members from its benefits. See *Associated Press v. United States of America*, 326 U.S. 1. We ask no more than that similar concepts be applied in the present cases.

III

EVEN ASSUMING THAT RIGHTS OF A LESS FUNDAMENTAL NATURE ARE HERE INVOLVED, NEVERTHELESS THE ABSOLUTE UNION-SECURITY PROHIBITIONS MUST FALL AS BEING DEMONSTRABLY ARBITRARY, DISCRIMINATORY AND WITHOUT RATIONAL BASIS; SUCH ABSOLUTE PROHIBITION OF SO IMPORTANT A RIGHT IS CLEARLY EXCESSIVE WHERE REGULATION WOULD ACCOMPLISH ALL POSSIBLE OBJECTIVES.

In the preceding section of this brief it has been demonstrated that the rights affected by the laws in question are of a fundamental nature going to the very existence of labor organizations and their ability effectively to function on behalf of their membership. If, however, it be argued or assumed that the rights invaded by the anti-union-security laws involved in the instant cases are not fundamental in nature, but instead comprise some lesser species of right, as, for instance, a bare right to bargain and to enter into contracts respecting union-security, protected only as would be a property right under the Fourteenth Amendment, then, nevertheless, the law must be stricken as an arbitrary and irrational deprivation of that right, even under the more stringent test of constitutionality that would then be applicable.

A. Principles Applicable to a Determination of Whether Legislation Is Arbitrary or Without Rational Basis.

It is recognized that the burden upon one challenging state legislation under its police power in the field of property rights protected solely under the due process clause of the Fourteenth Amendment or under the contract clause of Article I, Section 10, is a heavy one, and that the State has greater leeway in imposing regulations and prohibitions when only the Fourteenth Amendment is involved

than when is also the First. See *West Virginia v. Barnette*, 319 U.S. 624, at 638.

In *Nebbia v. New York*, 291 U.S. 302, this Court stated the applicable rule as follows:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exercise of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." (291 U.S. at 525.)
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> "* * * Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence *an unnecessary and unwarranted interference with individual liberty.*" (291 U.S. at 539). (Emphasis supplied.)

A similar test is applicable to attempts by the State to restrain the more specific liberty of contract as protected under the Fourteenth Amendment. See *West Coast Hotel v. Parrish*, 300 U.S. 379. Directly applicable because of the closer analogy between the facts presented is the case of *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, where this Court struck down a state law restricting, through the imposition of compulsory arbitration, the right of employers and employees to enter into mutually acceptable collective bargaining agreements. There, the Court stated (at 534) as follows:

> "These qualifications do not change the essence of the act. It curtails the right of the employer, on the one hand, and of the employee, on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the 14th Amendment. * * * While there is

> no such thing as absolute freedom of contract; and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances."

That similar considerations are applicable when considering possible conflict with the contract clause (Article I, Section 10) is seen from *Home Building & Loan v. Blaisdell*, 290 U.S. 398, and *East New York Savings Bank v. Hahn*, 326 U.S. 330.

Running through the foregoing and other decisions of this Court, undertaking to define the permissible limits of government regulation when rights under the Fourteenth Amendment or under the contract clause are asserted, are such phrases as "reasonable," "necessary," and "warranted." Time and again a "rational basis" test is used. See especially the dissenting opinion of Mr. Justice Frankfurther in *West Virginia v. Barnette*, 319 U.S., at p. 646. But obviously, judicial opinion concerning the "reasonableness" of any particular legislation or concerning the existence of a "rational basis" could vary as do the predilections and preconceptions of the individual Justices. Moreover, such opinions could very easily embody appraisals of wisdom or propriety or evaluations of policy, matters which this Court has constantly affirmed are not its concern. *Olsen v. Nebraska*, 313 U.S. 236. It was not many years ago that a too facile resort to an opinion concerning "reasonableness" resulted in abrogation of much legislation which a more critical examination would disclose, as it subsequently did disclose, had many rational bases in the serving of public interests. Aware of these and other considerations, this Court has evidenced an increasing reluctance to strike down legislation as violative of either the due process or contract clauses, the Court reading the Constitution to confer on the States a somewhat free hand in the exercise of their police power, and leaving to the demo-

cratic process the correction of abuses of that power. See Braden, *Umpire to the Federal System*, 19 University of Chicago Law Review 27. But that is not to say that this Court has abandoned or could abandon its function and duty of determining in each case whether the liberties essential to a free society and finding protection under the Fourteenth Amendment have been unwarrantedly denied, even though such liberties may not have the stature of other more fundamental liberties more specifically protected under the First Amendment or elsewhere. It needs no declamation to remind that nothing is more dangerous to the genius of our institutions than an unrestrained resort to the police power justified only by the existence of a vague public interest or social convenience. The protection of such rights of the individual as "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned" (*Allgeyer v. Louisiana*, 165 U.S. 578, at 589) is the principle purpose of the Constitution itself, and it is the Constitution alone, as enforced by this Court, which stands as a shelter against arbitrary or excessive invasion by the State, in the claimed exercise of its police power, of those individual liberties and freedoms. Thus, a too great reluctance to intervene when the Constitution is invoked gives encouragement to statism and is contrary to the spirit of a people who did all that was humanly possible to secure individual liberties in a written constitution. It must ever be remembered that

> "• • • By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people • • • The Constitution of the United States is a law for rulers and people, equally in war and in

peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." (*Ex Parte Milligan*, 71 U.S. 281.)

Thus, the task before the Court in the present cases, as in others where the Fourteenth Amendment is invoked, is to reconcile, under a test of reasonableness or arbitrariness, the need for protections of individual freedoms, daily becoming more precious in this world and age, with the need for social experimentation by the State, often found necessary to make those very freedoms more meaningfull. How best to accomplish so difficult and delicate an assignment? The approach first advocated by the late, great Justice Brandeis, while still a practicing lawyer before this bar, has contributed much to a solution. Under the promptings of his economic briefs in cases involving the constitutionality of social legislation, commencing with *Muller v. Oregon*, 208 U.S. 412, this Court has evolved a somewhat more strict and definite test than is afforded by the vague phrases of the Fourteenth Amendment or by judicial guess as to what is arbitrary or unreasonable. It is now held that any judgment concerning the reasonableness or unreasonableness of any particular legislation must be an informed judgment based upon as precise and accurate information as is obtainable concerning existing economic or social conditions involved in and justifying the attempted exercise of the police power. Reasonableness of legislative regulation or prohibition of constitutionally protected rights accordingly must depend upon an examination of all relevant facts and factors, including an examination of the nature of the activity which is being regulated or suppressed, of the impact of such regulation or prohibition upon the public, of the question of whether there are any social or economic conditions requiring intervention by the State, and of whether the public interest is in fact served by the prohibition. "Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induce it." McKenna, J., in *Mutual Loan*

Co. v. Martell, 222 U.S. 225, at 233. "The function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as an able exertion of governmental authority or condemn it as contrary or discriminatory." *Nebbia v. New York*, 291 U.S. at 536. And as further stated in the *Nebbia* case:

> "* * * regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." (291 U.S. at 525.)

Justice Brandeis, in his dissent in *Adams V. Tanner*, 244 U.S. 590, at 600, gave early and excellent expression to the applicable principles when he stated:

> "Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed, is obviously not to be determined by assumptions or by a priori reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible. Ex facto jus oritur. That ancient rule must prevail in order that we may have a system of living law.
>
> "It is necessary to inquire, therefore: What was the evil which the people of Washington sought to correct? Why was the particular remedy embodied in the statute adopted? And, incidentally, what has been the experience, if any, of other states or countries in this connection?"

The *Nebbia* case affords a classic illustration of the method which necessarily must be followed if the courts are intelligently to pass upon the ultimate question of the reasonableness of any particular law impairing private rights. There, the Court undertook a detailed study of the grave economic situation existing in the State of New York in the milk industry as a result of the 1930 depression and concluded that as an actual factual matter legislative intervention was necessary even though it involved setting

prices in an industry in no way dedicated to public use. But only after such examination did the Court conclude that,

> "*In the light of the facts* the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk." (291 U.S. at 530.) (Emphasis supplied.)[15]

Examination into economic facts and circumstances as a means of forming a basis for adequate judgment as to reasonableness is a necessary preliminary to such judgment if the exercise by the State of its police power is not to become a bootstrap proposition; under any other rule the mere assertion by the State of a need or necessity for any particular legislation would foreclose the question of

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[15] This method of approach by inquiry into facts and circumstances and into specific economic conditions, termed "sociological jurisprudence" by Dean Pound, has been described and commeated upon in important law review articles. See "Hours of Labor and Realism in Constitutional Law" by Felix Frankfurter, 29 Harv. Law Rev. 353; "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action" by Henry Wolf Bikle, 38 Harv. Law Rev. 6; "Due Process of Law, Police Power and the Supreme Court" by Ray A. Brown, 40 Harv. Law Rev. 943; "Police Power—Legislation for Health and Personal Safety" by Ray A. Brown, 42 Harv. Law Rev. 866; Note, 49 Harv. Law Rev. 631, "The Presentation of Facts Underlying the Constitutionality of Statutes."

Justice Brandeis, in particular, in his great dissents in cases involving social legislation, relied either upon legislative findings or upon sociological and economic data to support his conclusion that the particular legislation found justification and rational basis, or a lack thereof, in the existing economic circumstances and conditions. See his dissents, for instance, in *J. Burns Baking Co. v. Bryan*, 264 U.S. 504; *Truax v. Corrigan*, 257 U.S. 312; *New State Ice Co. v. Liebman*, 285 U.S. 262. The reasoning and method of approach set forth in these dissents have now been accepted by the full Court. See *Nebbia v. New York*, *supra*; see also *Muller v. Oregon*, *supra*; *McLean v. Arkansas*, 211 U.S. 539; *Price v. Illinois*, 238 U.S. 446; *Bunting v. Oregon*, 243 U.S. 426; *Levy Leasing Co. v. Siegel*, 258 U.S. 242; *Borden's Farm Products v. Baldwin*, 293 U.S. 194, for instances of the Court's reliance upon specific circumstances and economic conditions as serving to justify the challenged legislation. A compelling illustration is afforded by *Thompson v. Consolidated Gas Utilities Corporation*, 300 U.S. 55.

constitutionality. As stated in *Wolff Packing Co. v. Court of Industrial Relations, supra:*

> "• • • If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention • • •" (262 U.S. at 539.)

So much for applicable principles of law. Summed up, they amount simply to this: Rights under existing contracts and private liberties and freedoms protected under the Fourteenth Amendment are subject to restriction if there is an actual, not speculative necessity therefor in the protection of public health, safety, morals or welfare, and if the means adopted to accomplish such purposes are reasonably related to the ends sought. Whether there is such a basis must be determined factually by close examination into many factors. Only in this way can judgment on the ultimate question be adequate. It is the purpose of the following portion of this brief to demonstrate, in the light of all circumstances, including consideration of the nature and function of union-security agreements in a modern industrial society, that the laws abolishing union-security agreements are arbitrary, unreasonable and excessive because the law finds no basis or justification in any existing or possible social or economic conditions requiring such drastic intervention by the State; because the law serves no possible public interest, but, on the contrary, operates to the prejudice of the public generally and serves to benefit only private rights of a limited class; and because the law is excessive in that any possible object sought to be achieved can be achieved by regulation of the union-shop relationship rather than by complete and unqualified prohibition.

B. The Nature of the Activity Proscribed and the Impact of Such Proscription.

The first step in determining the reasonableness of the prohibitions in question is to inquire into the nature of the activity proscribed, together with the effect of the legislation—here complete prohibition—on such activity. Thus, it can be seen whether the extent of the taking is great or small. If great, the justifications in public interest should reasonably be commensurate on the principle that one does not sever an arm to save a finger. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, at 413, 414, where the Court speaking through Mr. Justice Holmes, stated:

> "The extent of the public interest is shown by that statute to be limited * * * On the other hand, the extent of the taking is great."

The salutary and beneficial functions of union-security agreements—not only in respect to labor organizations and employees but also in respect to employers and the general public—have been previously referred to in this brief and are established in the record either by admitted allegations or by specific testimony of expert witnesses. The entire discussion in Part II indicates that the principal of union security goes to the very core of American unionism. It is hardly to be disputed that agreements requiring union membership as a condition of employment constitute the *only* proven and effective means for working people to obtain and insure (1) their collective security and the maintenance of their labor unions once organization is achieved; (2) an equality of bargaining power as a means of obtaining an adequate share of the joint product of capital and labor; and (3) the consolidation of gains achieved in collective bargaining and the protection of working standards through elimination of the cutthroat wage competition of non-union employees and enforcement of the common rule.

In addition to what has been stated in earlier portions of this brief, other considerations are here relevant. For

instance, the union-security agreement as the one means available to labor for consolidating its gains and eliminating ruinous wage competition can well be contrasted with the many methods available to business managers for bringing about price and production control and for consolidating a profitable position in an industry or trade once it has been achieved. The study attached to the Economic Brief herein as Appendix E examines in detail the various techniques available to and used by business managers in an effort to secure collective security for themselves through the regulation or elimination of price competition and directs attention to five "influence pressures" and dozens of "economic pressures" used for bringing about price and production control, together with seven "consolidation measures" available when such price stability has been achieved, most of which pressures and methods have been sanctioned by the courts and the legislatures. As against this, organized labor has been deprived of its one consolidative technique. See Appendix E, pp. 18-24.

The heavy contribution made by union-security agreements to industrial stability and peace is demonstrated at length in the Economic Brief. It is there shown that, in addition to producing harmonious and productive relationships in many industries, union-security agreements have played a fundamental role in forestalling wage decreases and in counteracting inflationary trends. See Economic Brief, pp. 46-62. The Economic Brief further demonstrates that elimination of the union-shop institution will inevitably lead to disruption of previously harmonious relationships and to strife and turmoil over broad industrial fronts where labor organizations will once more find themselves fighting for their very existence.

Finally, it is important to note that the courts have universally recognized the union-shop principle as an indispensable factor in the process of establishing and protecting wage standards and organization itself. Attached to this brief as Appendix F is a compilation of cases in twenty-six

states which, either directly or by positive inference, uphold union-shop agreements. See also Appendix E, p. 5, f.n. 7(B). The rationale of these decisions is summed up in the *Restatement of the Law of Torts*, pp. 128-130, 166, 167.

It is further significant that the federal Congress, both in the original and the amended National Labor Relations Act,[16] and the legislatures of seventeen states specifically authorize union-security agreements.[17] Such legislative and judicial sanction, at the very least, recognizes the necessity and indispensability of union-security agreements in a modern industrial society.

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[16] 49 Stat. 452 (1935), 29 U.S.C.A. Sec. 158(3) 1947), as amended, 29 U.S.C.A. Sec. 158(a)(3) (Supp. July, 1947).

[17] Cal. Lab. Code (Deering 1943) Sec. 1126; 3 Colo. Stats. Ann. (Michie, Supp. 1946) c. 97, Sec. 94(6)(c) (requires three fourths of employees in a bargaining unit to vote authority for the execution of the agreement); Conn. Gen. Stats. (Supp. 1945) Sec. 937h(5); Del. Laws 1947, H.B. 212 Sec. 3 (a), 2A CCH Lab. Law Serv. 41001-2; but the Alabama Supreme Court has refuse or agree to execute a union security agreement); Me. Laws 1947, c. 25, Sec. 41-A, as added, c. 395, 2A CCH Lab. Law Serv. 43301 (1947) (prohibits the closed shop form of union security agreements but permits the union shop form); Mass. Gen. Laws (1947) c. 150A, Sec. 4, subsec. (3), as amended, c. 657, 2A CCH Lab. Law Serv. 43503.2 (1947); Mich. Comp. Laws (Mason Cum. Supp. 1940) Sec. 8628.14; Minn. Stats. (Mason 1941) Sec. 179.12(3); Mo. Laws 1947, S.B. 79, Sec. 5; N. H. Rev. Laws (1942) c. 212, Sec. 21, as amended, Laws 1947, c. 194, Sec. 21, 21-a, 2A CCH Lab. Law Serv. 44601, 44602 (1947) (requires two-thirds of employees voting to authorize execution of the agreements, but they must be at least a majority of all employees in the bargaining unit; Ala. Acts 1943, No. 298, Sec. 8, p. 256 Laws 1947, c. 47 and 75, Secs. 34:13B-2; 2A CCH Lab. Law Serv. 44701, 44702 (1947); N. Y. Labor Law art. 20, Sec. 704(5); Pa. Stats. Ann. (Purdon 1941) Sec. 211.6(c); R. I. Pub. Laws 1941, c. 1066, Sec. 5, subsec. 5; Utah Code Ann. (1943) Sec. 49-1-16(e); Wis. Stats. (1943) Sec. 111.06(c)-1, as amended, Laws 1945, c. 424 (requires two-thirds of employees voting to authorize execution of the agreement, but they must be at least a majority of all employees in the bargaining unit); N. J. Rev. Stats. (1946) c. 38, as amended, (this law was at first interpreted by the state attorney general as proscribing union-security agreements, see *Opinion of Attorney General, Nov. 20, 1945*, 2A CCH Lab. Law Serv. 41905 (1947) (however, an employer can lawfully recently held that it proscribes only those agreements achieved through force and intimidation while permitting all other agreements. Hotel and Restaurant Employees Int'l Alliance and Bartenders League of America v. Greenwood, 30 So. 2d 696 (Ala. Sup. 1947).

The States of Arizona, Nebraska and North Carolina have eliminated this institution of the union shop, and in doing so it is important again to note that they have failed to provide any substitute or equivalent for the union-security principle, such as, for instance, might be afforded by state control as under the Railway Labor Act (App. E, pp. 28-29; Economic Brief, p. 66). While it might be argued that the Nebraska and North Carolina laws prevent discrimination against union workers (as does also the National Labor Relations Act in interstate industries), the remedies available for such discrimination are not altogether satisfactory (Economic Brief, pp. 44-45), and, in any event, as we have seen, the primary function of union-security agreements is not the elimination of opportunity for discrimination, but achieving an equality of bargaining power and the elimination of wage competition of unorganized employees, whether such competition be felt by the direct competition for wages in plants where no exclusive collective bargaining rights exist or by the gradual but inevitable elimination of the majority status and bargaining power of organizations have an exclusive recognition status, but not having any assured means of maintaining that status, such as the union shop alone can bring.

We are now in a position to make a more exact appraisal of the reasonableness of the absolute prohibition of union-security agreements attempted in the present cases. A right or a liberty which has become an institution in our twentieth century industrial economy and which has been sanctioned by courts and legislatures everywhere has suddenly been outlawed, and this without any substitute whatsoever being provided, or without any exceptions being specified. An institution going to the very core of unionism, and which arose out of and has its reason for being in the necessities of the situation, has been destroyed. An important and traditional subject matter of collective bargaining has been withdrawn from the field of employer-employee negotiations. Employees have been deprived of their one

technique for eliminating cutthroat wage competition of non-union employees and for consolidating gains and bargaining strength, while, on the other hand, business managers have been permitted to retain many techniques for regulating price and production policies directly affecting competition between employers and employees. The ability of business managers to gain an adequate share of the national income has been directly increased, while that of organized employees has been directly lessened. A useful and often beneficial method of stabilizing industrial relations has suddenly been withdrawn. Surely, the justification for this deprivation must be compelling, or there is no institution, no activity, which is safe from obliteration by the State in the claimed exercise of its police power. What are these justifications?

C. The Inadequacy of the Claimed Justifications for Complete Prohibition of Union-Shop Agreements.

To begin with, it should be noted that the States of Arizona, Nebraska and North Carolina, unlike the State of New York in the *Nebbia* case, *supra*, did not undertake a detailed study of the economic conditions arising out of or because of the use of union-shop agreements as a means of determining whether legislation was in order. There is no record of any legislative hearings or of any legislative findings concerning the impact of union-security agreements upon the public or of conditions affording a basis for the proscriptions in question. In the *Nebbia* case and other similar cases before this Court the findings of legislative bodies or of investigatory legislative committees were heavily relied upon in finding justification for the particular regulations.

What was deemed justification for the legislation—what are its purposes—can be obtained only from an examination of the legislation itself and, in particular, from an examination of the title, preamble or declaration of purpose. Further light on this question can be obtained from the arguments advanced both by the respective Attorneys

General in support of the legislation and by the sponsors of the legislation who appeared in court to argue respecting its validity. From these sources the claimed justifications can be classified as follows: (1) protection of the right of individuals to work without joining a union; (2) prevention of monopolies; (3) correction of abuses said to arise out of the union-shop relationship, such as arbitrary expulsions or refusals to admit; (4) prevention of strikes over union-security agreements; (5) prevention of unions' obtaining undue power under union-security agreements and consequently making unreasonable demands. The following portion of the brief will analyze the last three of such claimed justifications and demonstrate their inadequacy; the first two claimed justifications have been discussed and disposed of earlier in this brief (pp. 61-75).

1. Correction of Abuses.

The proponents of the anti-union-shop legislation assert that union-shop agreements may and do give rise to abuses by union parties to union-shop agreements, which abuses directly affect job rights, as, for instance, arbitrary expulsions from or refusals to admit into membership, or favoritism in supplying employees when called upon to do so under certain types of union-shop agreements, or other internal practices which may cause individuals, otherwise qualified, to lose employment opportunities. It is said that the prevention of such abuses are assuredly a legitimate object of state legislation.

To begin with, it is to be noted that the anti-union-shop laws of the States of Arizona, Nebraska and North Carolina are not directed at such abuses, but are applicable regardless of whether any such abuses do exist and regardless of whether unions within the State freely admit all qualified applicants to membership. Furthermore, no such abusive conditions do as a matter of fact exist in any of the three States, and no claim has been made that unions in these States function internally, under union-shop agreements, in a manner arbitrarily to deprive employees of job rights. In North Carolina, the uncontradicted testi-

mony discloses that "all organizations holding union-security agreements within the State freely admit all qualified applicants into membership" (No. 34, R. 18). The democratic procedures in respect to admissions and expulsions are testified to at length (No. 34, R. 18-20). In the Arizona and Nebraska cases the following allegation is made and admitted:

> "Membership in the plaintiff labor organizations, as well as all other labor organizations operating in the State, is open to all qualified persons, and such organizations freely admit qualified applicants into membership and impose no arbitrary or unreasonable requirements as a condition to membership or the continuation thereof. All of such labor organizations welcome and admit to their ranks all persons in the respective lines of work who can meet the requirements as to skill prescribed by such organizations and who will submit to the reasonable discipline and by-laws of such unions and who are of good character and will agree to fulfill the contracts entered into by said unions." (No. 27, R. 16; No. 47, R. 7.)

It is asserted that while such abuses may not exist in these States, they do exist in other States and may come to exist in these particular States some time in the future. But this Court has held that legislative deprivation of rights and liberties protected under the Fourteenth Amendment cannot rest merely upon "fanciful conjecture" (*Borden's Farm Products v. Baldwin*, 283 U.S. 194) and cannot be "unsupported by anything of substance" (*Liggett v. Baldridge*, 278 U.S. 105). Surely, at least a tendency on the part of labor organizations within the State to thus abuse the union-shop relationship must appear before the State can attempt regulation, and even then, as will be demonstrated in a later portion of this brief, the State must deal with the abuses themselves rather than the institution under which the abuses may arise, unless it can be shown that such abuses are a necessary and inevitable result of the institution and can be dealt with in no way other than by abolishing the institution. Killing the patient

to cure a cold, or a possible future cold, has never been considered a reasonable method of approach. That the use of union-shop agreements does not inevitably result in closed unions or in practices of arbitrary admission and expulsion more closely corresponds to the available evidence than an opposite conclusion. As stated in the Law Review article attached hereto as Appendix E, p. 39:

> "While there have been instances of abuses of closed unions, there is no evidence to show that the closed union has been the inevitable result of union-security agreements or even closely associated with the agreements. There is, moreover, general evidence to show that workers are freely admitted to unions having union-security agreements in existence. In the first place, the objective of the union-security agreements, as has been frequently observed, is not to limit entrance into the union but rather to increase union membership. That the objective has been realized is shown by an examination of the progress unions have made since legislative sanction was generally given to union-security agreements. In 1933, there were approximately 3,000,000 union members. As a result of the various anti-injunction statutes and affirmative sanctions of the agreements, union membership had increased to approximately 15,000,000 in 1947. Further, it is established by various studies that what incidence there is of closed unions, it is less in times of prosperity and greater in periods of economic distress when unions may seek to protect the jobs of their members. The postwar period which presumably led to the passage of the statutory bans on union-security agreements was one of increasing prosperity in which jobs were so plentiful that unions could not supply all the workers required by employers. In many instances business managers hired whom they could. Some unions joined with business managers in apprentice training programs in order to increase the supply of trained workers. Finally, the growth of industrial unions as opposed to craft unions in recent years has operated to facilitate entrance to unions by workers of all classes within a plant."

2. Prevention of Strikes for Union-Security Agreements.

It is asserted by proponents of legislation outlawing union-security agreements that such legislation is justified on the ground that efforts to secure union-security agreements result in strikes and labor disturbances. Of course, on this premise any of the traditional objectives of labor organizations, such as shorter hours, or higher wages, could be proscribed; assuming the legitimacy of the objective, it could hardly be within the province of a State to outlaw such objective on the sole ground that the seeking of it might precipitate strikes or other industrial disturbances, at least where no adequate substitute for obtaining or realizing such objectives is provided. *Wolff Packing Company* case, *supra*. Any other view would nullify the entire right of self-organization—a right whose free exercise cannot be previously restrained or impaired in the absence of grave and immediate public danger. See *Thomas v. Collins* and earlier discussions herein.

Furthermore, all available economic data indicates that union-security agreements and efforts to obtain them do not cause industrial conflict to any degree. Of the 4900 work stoppages in 1946, only 2½% had for their sole object the obtaining of some form of union-security agreement. During that period 90% of all collective bargaining agreements were renewed without a strike, and this during the greatest strike wave in the nation's history. See Economic Brief, Appendix E, pp. 35-36; Economic Brief, p. 104. In only three of the twenty-nine major strikes of 1946 (which twenty-nine accounted for more than three-fourths of the total lost time) was union-security at issue at all, and in these three the union shop was only one of the issues. See Economic Brief, p. 104.

Far from the union-shop agreement in itself resulting in work stoppages, the available evidence indicates that union-shop agreements act as a preventative against or a solvent for such disturbances. See Economic Brief, pp. 46-53; Appendix E, thereof p. 35.

3. Prevention of Unions Becoming Overpowerful.

The final justification advanced for the outlawing of union-security agreements is the argument that such agreements make unions too powerful, that they cause them to make unreasonable demands, to engage in featherbedding practices, to restrict production, and the like. Of course, the immediate answer to this contention is that the real objection of those who assert this justification is to unionism itself, to the spread of organization, to the enlisting of all employees within a plant or within a trade or within an industry into one or more labor organizations. It is hardly within the province of a legislature to prejudge the reasonableness of demands, or to do other than leave the determination of such matters to collective bargaining between the parties. See discussion, p. 100, supra; Economic Brief, Appendix E, pp. 37-38.

In any event, the available evidence does not indicate that union-shop agreements in and of themselves inevitably give rise to the making of such arbitrary or unreasonable demands as to require their suppression. For instance, in respect to the charge of featherbedding, there is nothing to indicate that such practices are necessarily inherent in, or even a correlative incident of union-security agreements. On the contrary, common knowledge indicates that there is no such necessary connection. Thus, it is often asserted that the railroad unions engage in many featherbedding practices, and yet there are no closed-shop agreements in the railroad industry.

Further, far from union-security agreements resulting in any restriction of output or any interference with production, the weight of the evidence is overwhelming that the union-shop does not bring such results but, on the contrary, makes for higher efficiency and maximum productivity. See Economic Brief, pp. 106-108. One aspect of this was noted by Mr. Justice Jackson in his dissent in the *Wallace Corporation* case, 323 U.S. at p. 267:

"* * * a closed shop is the ultimate goal of most union endeavor and not a few employers have found it a stabilizer of labor relations by putting out of their shops men who were antagonistic to the dominant unions, thus ending strife for domination."

D. Total Prohibition Rather Than Regulation Is Excessive and Arbitrary.

The discussion in the preceding section has indicated that, as a practical matter, there were no actual abuses or even abuses reasonably to be feared in the foreseeable future, which could serve as justification for the outlawing of union-security agreements in either the States of Arizona, Nebraska or North Carolina. However, even if it be assumed that abuses or abusive conditions of the type hereinbefore discussed are reasonably to be feared, and that protection against such possible future abuses is a legitimate function of the State in the exercise of its police power, nevertheless it is incumbent upon the State to deal with such possible abuses as such rather than to outlaw the institution or the activity out of which the abuses may arise, particularly where the activity or the institution itself is not inherently harmful but, on the contrary, serves many salutary, indeed indispensable, functions. There is possibly no industry, no activity, no occupation, which does not give rise to or afford opportunity for abuses; if the mere presence or possibility of such abuses afforded justification for proscription of the activity, few, if any, of our institutions would be safe from destruction by the State. Even if the matter of union-security involved only a question of contract-making power, it is clear that fraud, opportunities for abuse and actual abuse occur under all types of contractual relationships. Thus, for instance, overreaching is very possible under various types of insurance contracts, but it would hardly be proper for the State to deal with this possible abuse by prohibiting the making of all insurance contracts. As this Court stated in *Liggett v. Baldridge*, 278 U.S., at 113, "A State cannot under the guise of protecting the public, arbitrarily inter-

fere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'"

In other cases this Court has indicated that where it is possible to secure a legitimate objective, without impairing essential rights or principles, or without imposing hardships in disproportion to possible benefits, the State must so proceed. *House v. Mayes*, 219 U.S. 270; see also *Tolliver v. Blizzard*, 143 Ky. 773, 137 S.W. 509.

It has not been argued, nor could it very well be argued, that each and every one of the claimed abusive conditions or other evils said to arise out of the union-shop relationship could not be reached by some method other than outright prohibition of the institution itself. Federal and state legislatures have already indicated at least three methods of controlling the relationship without destroying it. Some States regulate the mode of using union-security agreements, as by requiring authorization of a given percentage of employees as a condition to the execution of an agreement. See Economic Brief, Appendix E, p. 41, f.n. 179. Some States regulate the form of the agreement, as, for instance, the Taft-Hartley Act and the laws of Maine, which prohibit full closed-shop agreements but permit union-shop agreements. See Economic Brief, Appendix E, p. 42, f.n. 180. And some regulate the functioning of unions under union-shop agreements, as, for instance, by regulating admissions and expulsions. See Economic Brief, Appendix E, p. 42, f.n. 182-186. In Massachusetts, the State Labor Relations Act provides that a contract which makes union membership a condition of employment is legal but adds that if a union denies to any employee eligibility to full membership and voting rights, such contract shall not be applicable to him. The statute also provides that if discrimination in employment occurs as the result of application of a closed-shop agreement that an employee may have recourse to the State Labor Relations Board for a hearing, in addition to such remedies as may be available within

the union. (Chap. 150A, Section 4, subsection (6), Massachusetts State Labor Relations Act.)

In a number of cases this Court has indicated that an absolute prohibition, as opposed to regulation, of a particular activity or occupation was a denial of due process where it appeared that the taking was very great and the evil sought to be remedied was incommensurate, and that the evils could be avoided by legislation short of prohibition. In connection with the thesis advanced in this portion of the brief, the following language of the Court in *Adams v. Tanner*, 244 U.S. 590, at 594, is applicable, even though this Court may not agree with the ultimate holding in the case:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensive practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

That case involved a question of whether due process was infringed by an outright prohibition rather than a regulation of private employment agencies in the State of Washington. While the majority held that such prohibition was excessive, Mr. Justice Brandies, with whom Justice Holmes and Clarke concurred, dissented on the grounds that available economic material supported "a conviction that the evils of private agencies were inherent and ineradicable;" that these evils were very great and the problem confronting the people of Washington because

of the operations of private employment agencies "was far more comprehensive and fundamental than that of protecting workers applying to the private agencies." In his dissent, Mr. Justice Brandeis undertook a thorough survey of the nature of private employment agencies and problems which arose thereunder and found as a fact that the attendant evils were great and the institution of private employment agencies not a particularly useful or indispensable one.

With this approach and with the ultimate conclusion reached in Justice Brandeis' dissent we are in accord. Appellants do not contend that, merely because an activity or occupation is not inherently evil, it cannot be prohibited but must be regulated, or even that prohibition is inconsistent with due process where the same end result might conceivably be reached by regulation. Whether prohibition is reasonable depends upon a number of factors, the most important of which are, first, the nature of the subject matter being prohibited, and second, the nature of the evils which the State seeks to prevent. If, as in the present case, the activity in question is a fundamental one serving many salutary and indispensable purposes, the total prohibition of which would have adverse repercussions not only upon a large segment of the public, but also upon the entire economy of the State; and if, as in the present case, both the evils reasonably to be feared and the interests to be protected are slight or imaginary, then reasonable men could hardly differ on the proposition that prohibition would be excessive and arbitrary when regulation could accomplish the desired result.

A case similar in nature to *Adams v. Tanner, supra,* is *D. E. Weaver v. Palmer Brothers,* 270 U. S. 402. There, this Court found an absolute prohibition of the use of shoddy in the making of comforters to be arbitrary where regulation would have served the legislative purpose of eliminating a health hazard. Although Mr. Justice Holmes dissented along with Justices Brandeis and Stone, he

implied that, were not the evils great, and were it possible to distinguish the end products of good and bad manufacturing techniques, he might question the absolute prohibition. In *Cotting v. Godard*, 183 U.S. 79, this Court noted that "limitation is not the equivalent of confiscation."

The principle that total prohibition of an activity or occupation not *malum in se* is excessive where regulation would suffice is accepted not only by this Court but throughout the States. See Freund, "The Police Power," Sec. 62. See, in particular, *People v. Weiner*, 271 Ill. 74, 110 N.E. 870; *People v. Ringe*, 197 N.Y. 143, 90 N.E. 451, 27 L.R.A. (N.S.) 528, 18 Ann. Cas. 474; *Marymont v. Nevada State Banking Board*, 33 Nev. 333, 111 Pac. 295, 32 L.R.A. (N.S.) 477, Ann. Cas. 1914A, 162. Indeed, at least two (North Carolina and Nebraska) of the three courts in the cases below have indicated strong agreement with the rule; in view of the forceable language in the following decisions, their reluctance or refusal even to comment on this particular argument, pressed both in brief and orally, is somewhat surprising. In *North Carolina v. Harris*, 216 N.C. 746, 6 S.E. (2d) 854, 128 A.L.R. 658, the North Carolina Supreme Court said:

> "Referring to industrial trades, it is said in the article on Constitutional Law, 11 Am. Jur. 1048: 'As to them, the power of regulation is comparatively slight, when they are conducted and carried on upon private property and private means.' In such cases the law-making body is usually relegated to restrictions more distinctly regulative rather than prohibitive. The principle justifying requirements of personal fitness as a condition for engaging in an occupation is a narrow exception to pertinent constitutional guaranties of personal liberty which cannot be enlarged beyond its proper scope without such violence to their purpose as would be subversive of the freedom which has been universally attributed to the American system.
>
> "*It follows that there is a well recognized gap between the regulation of a business or occupation and*

restrictions preventing persons from engaging in them to which courts must pay careful attention.

"There is nothing in government more dangerous to liberty and rights of the individual than a too ready resort to the police power. It is a sufficient reference to history to recall that these restraints were the outcome of an appreciation of that fact, born of experience. They are categorically addressed to that issue. They are the product of an individualistic age, and there is little room to doubt their intended scope and purpose as affecting decision in the instant case. Resort to the police power to exclude persons from an ordinary calling, finding justification only by the existence of a vague public interest, often amounting to no more than a doubtful social convenience, is *collectivistic in principle, destructive to the historic values of these guaranties, and contrary to the genius of the people who did all that was humanly possible to secure them in a written constitution.* We believe that they were intended to give to the individual a larger endowment of personal liberty than could be otherwise guaranteed; a greater opportunity for initiative, and the acquisition of those interests which make for responsible citizenship." (Emphasis supplied.)

In *Webber v. City of Scotsbluff*, 141 Neb. 363, 3 N.W. (2d) 635, the Nebraska Supreme Court stated:

"That the City of Scotsbluff had the power to enact an ordinance regulating auction sales is not questioned. This power is statutory. Comp. St. 1929, sec. 16-238. The question is not the lack of power to enact, but whether or not the enactment places *arbitrary and unreasonable restrictions* on the conduct of lawful business, whether or not it is class legislation, whether or not it is a *prohibition instead of a regulation*, whether or not it is in violation of the guaranties of the Constitution of Nebraska, and whether or not it is *violative of the Fourteenth Amendment to the Federal Constitution.* * * *

"The right to regulate auction sales is found in the police power, and the regulatory provisions of an

ordinance under the police power must have some relation to the public health, safety or welfare. . . . If they do not bear such relation they are void as an invasion of the property rights of persons affected by their enforcement. * * *

"*Assuming that these regulatory provisions do have some relation to public health, safety or welfare, it seems clear that they arbitrarily and unreasonably interfere with private business and impose unreasonable and unnecessary restrictions on auction sales and for that reason may not be upheld* * * *: In the sense of the approach by the City of Scotsbluff to auction sales, the ordinance here is in its essence in terms *restrictive rather than regulatory.*

"We conclude, therefore, that the provisions of the ordinance in question to which attention has been directed are *unreasonable and arbitrary,* that they are, as applied to the business of selling at auction, *restrictive rather than regulatory,* and that the entire ordinance creates an arbitrary, illegal and unreasonable classification. The ordinance is, therefore, in its entirety *unconstitutional and void.*" (Emphasis supplied.)

While it is true that the States have great discretion both in the choice of subjects of legislative regulation and in the means of accomplishing desired ends, still some restraint must exist if individual freedoms are to survive. The principle long ago expressed by Mr. Justice Holmes in the *Mahon case,* 260 U.S., at 414, that total prohibition might be excessive where "The extent of the public interest is shown by the statute to be limited * * * [and] on the other hand the extent of the taking is great" is a sound one; to follow it does not involve any real interference with legislative prerogatives, while, on the other hand, a degree of protection for individual liberties is thereby accorded as against ill-considered legislation sometimes resulting from the "clamor of an excited people" or from mass hysteria and passing public frenzies often all too easily induced by a hostile and undiscriminating press.

E. Discriminatory Aspects of Prohibition.

1. In General.

Final evidence of the irrationality and unreasonableness of any outright prohibition on the making of union-security agreements, as well as of possible violations of the equal protection clause of the Fourteenth Amendment, is seen in the discriminations and inequities thereby produced. One result of discrimination has already been noted, namely, the fact that while, on the one hand, organized labor is deprived of its one consolidative technique, business managers are left with at least seven such techniques having direct relationship to their dealings with organized labor. See p. 91, *supra;* also Economic Brief, Appendix E. p. 29. Assuredly, the scales have been made to weigh heavily and unreasonably on the side of management as a result of depriving workers of the right to enter into union-security arrangements, and the ability of workers to compete with business managers in gaining an adequate share of the national income has been materially lessened.

Similarly, the ability of organized employees to compete with unorganized employees for fair wages has been reduced if not destroyed. Surely, the State has lent its weight and support to one class of competitor and against another in the economic struggle and competition between workers not only for jobs but for jobs which pay an adequate wage. It has sided with those workers who believe they can best bargain with their employer individually in majestic, if poverty-stricken, aloofness from their fellow workers, and against those workers who, heeding the lessons of the centuries, believe that "a single employee is helpless in dealing with an employer * * * and that union is essential to give laborers opportunity to deal on an equality with their employer." *(National Labor Relations Board v. Jones & Laughlin Steel Corporation, supra.* It has thrown its weight on the side of the "free rider" who, though perfectly willing to accept all the benefits of collective bargaining achieved only through the struggle

and sacrifice of his fellow workers who are union members, is unwilling to contribute to the costs of such benefits."[18]

Since under any law outlawing the union-security principle the State can be interested only in benefiting a particular class of private persons, namely, non-unionists or those claiming an unqualified right to work without joining with their fellow workers in a labor organization, and not the public in general, the holding of this Court in *Treigle v. Acme Homestead Association*, 297 U.S. 189, is applicable. There, this Court held that legislation restricting rights protected under the Fourteenth Amendment or under the contract clause must be enacted for a purpose reasonably connected with protecting public interest as distinguished from a purpose of protecting purely private rights. In that case the State of Louisiana had attempted to alter contracts between building and loan associations and their members, by penalizing members withdrawing from the association for the benefit of those who remained. In deciding that the due process clause had been violated, this Court, in a unanimous opinion, stated as follows:

> " • • • We recognize that these associations, like banks and public service companies, are subject to a degree of regulation which would be unnecessary and unreasonable in the case of a purely private corporation. *But laws touching building and loan associations, like those affecting banks or utility companies, must be confined to purposes reasonably connected with the public interest as distinguished from purely private rights.* The legislature has no greater power to interfere with the private contracts of such corporations,

[18] In *American Federation of Labor v. Watson, et al.*, 60 Fed. Supp. 1010 (later reversed by the United State Supreme Court in 327 U.S. 582), a Florida three-judge District Court attempted to answer the "free rider" argument and its obvious analogy to the requirement that all in a community pay taxes to support the community by asserting that under our tax system there are also many "free riders." Such an answer overlooks the obvious fact that taxes are required of all who, like employees receiving wages achieved through collective bargaining, have an ability to pay and are particularly required of those obtaining special benefits.

or the vested rights of their stockholders as such, under the pretext of public necessity, than it would have to attempt the same ends in the case of a private corporation. *Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive.*

"As we have pointed out, the questioned sections deal only with private rights, and are not adapted to the legitimate end of conserving or equitably administering the assets in the interest of *all members.* They deprive withdrawing members of a solvent association of existing contract rights, *for the benefit of those who remain.* We hold the challenged provisions impair the obligation of the appellant's contract and arbitrarily deprive him of vested property rights without due process of law." (297 U.S. at 197.) (Emphasis supplied.)

There is also involved in these laws, over and above the foregoing inequities, a particularly insidious form of confiscation. Under federal law labor organizations which represent a majority of the employees in an appropriate bargaining unit are under obligation to represent equally all employees in the bargaining unit. *Steele v. Louisville & Nashville Ry. Co., supra.* Such an organization has imposed upon it the duty of extending its services impartially to all who comprise the industrial society for which it speaks and acts. But the costs of industrial self-government, like the costs of political government, are not small. The costs to the labor organization of obtaining wage increases and other improvements of working conditions, the expense of servicing an agreement already entered into, of adjusting grievances, of maintaining stewards and business representatives, are considerable, and the process of collective bargaining itself involves financial outlay, as, for instance, the hiring of economists for research work, the hiring of lawyers for legal advice, and the paying of com-

pensation for the loss of time occasioned to employees acting as bargaining committees. Yet unions are denied the right to seek, through closed-shop agreements, to require all who benefit from collective action to contribute to the costs thereof.

The implications of the Steele case denote another species of discrimination. It can truthfully be said that by virtue of their obligation to serve equally all within the bargaining unit, federal law has imposed upon labor organizations obligations akin to those of governmental bodies, public utilities or common carriers. It could hardly be asserted that a law requiring utilities or common carriers to extend their services to some customers on gratuitous basis, while requiring the remaining and similarly situated customers to carry all of the costs of maintaining the service, would be constitutional. Wherever comparable attempts have been made, the courts have promptly struck them down as unconstitutional. Numerous cases on this point are set forth in the footnote to the general rule stated in 43 *American Jurisprudence* 683 to be as follows:

> "As a general rule a public utility cannot discriminate unjustly in its rates to consumers similarly situated or of the same class for the same service or kind of service."

See, in particular, *Cotting v. Godard,* 183 U.S., at p. 86, wherein it is stated as follows:

> "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking

of private property for public use without just compensation or without due process of law.'"

See also *Louisville & Nashville R.R. Co. v. Railroad Commission*, 19 Fed. 679, where it was held that a statute giving a railroad commission the power, for undisclosed reason and without accountability to anyone, to give better rates to one corporation than another was unconstitutional. And see *Salisbury & Spencer R.R. Co. v. Southern Power Co.*, 179 N. C. 18, 101 S.E. 593, 12 A.L.R. 304, where it was held that an electric power utility cannot discriminate in charge or service between the several members of the class desiring or utilizing its service.

2. Particular Discrimination in Respect to the Arizona Enactment.

The Arizona amendment requires special consideration in respect to the question of whether the equal protection of the laws clause of the Fourteenth Amendment is or is not violated. The Arizona law, unlike the laws of Nebraska and North Carolina, or of any of the other States which have outlawed union-security agreements, forbids denial of employment only by reasons of *non*-membership in a labor organization. Thus, while under the Nebraska and North Carolina laws, an employer is not free to refuse to hire or to discharge because of an employee's membership in a labor organization, in Arizona the employer is free to refuse to hire or discharge an employee because he is a union member. If, indeed, it is the right to work which it is the purpose of the State to protect, and even if we assume that the right to work as a non-unionist is correlative with the right to work as a unionist and is a proper subject matter of legislative protection, on what theory is protection of the right to work to be extended only to non-unionists and withdrawn from employees who are members of labor

organizations? In the face of the long and shameful history of employer interference with the right of self-organization through discharge of union members—a history so notorious as to give rise to the passage of the National Labor Relation Act. *(N.L.R.B. v. Jones & Laughlin Steel Corp., supra)*, can it very well be asserted that abuses or evils of job discrimination occur only in respect to non-union members? Obviously not. Neither can it reasonably be said that the evil sought to be cured is most prevalent in respect to non-union employees. Surely, it is the rankest sort of discrimination to deny union members protection against discharges occasioned by reason of their union membership, while affording a protection for non-union members against discharge because of lack of union membership.

It is argued that two sections of Arizona laws passed in previous years affords protection to union members, and therefore the State need only legislate in respect to non-union employees. The sections referred to are 43-1608 and 56-120, A.C.A. 1939.

Section 43-1608 provides:

> *"Coercing persons not to join labor organizations.*—Any person who shall coerce or compel any other person to enter into an agreement, either written or verbal, not to join or become a member of any labor organization, as a condition of such other person securing employment or continuing in the employment of any such person shall be guilty of a misdemeanor."

Section 56-120:

> *"Coercive contracts void.*—Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in either:
>
> (1) A contract or agreement of hiring or employment between any employer and any employee or prospective employee, whereby (a) either party to

such contract or agreement undertakes or promises not to join, become or remain, a member of any labor organization or of any organization of employers, or (b) either party to such contract or agreement undertakes or promises that he will withdraw from the employment relation in the event that he joins, becomes or remains, a member of any labor organization or of any organization of employers;

"* * * is hereby declared to be contrary to public policy and wholly void and shall not afford any bases for the granting of legal or equitable relief by any court."

It is apparent that both of the above sections apply only to contracts of employment between the employer and individual employees, and both appear to be for the purpose of preventing the execution of the so-called "yellow dog" agreement. Neither section makes it unlawful for the employer to deny employment to a union man or to discharge him upon the ground that he is a member of the union. The sections are limited in operation to the execution of contracts whereby the individual employee agrees not to remain or become a member of a labor organization. While the employer would have no right to enter into the contracts condemned, he would have the undoubted right to refuse to hire a union man, and the right to discharge him upon the ground that he was a member of the union.

The Supreme Court of Arizona, in considering the above statutes in the present case, did not construe them otherwise and did not construe such sections to outlaw discrimination against union members in respect to hire and fire, such as, for instance, was accomplished under Section 8 (3) of the Wagner Act; to the extent that there might be any contrary implication, this Court is not bound as against the plain language of the sections themselves. See *Venice v. Murdock*, 92 U.S. 494. All that the Arizona Court did hold was that it was not "necessary for the people to have encompassed in one constitutional amendment a corrective

for all evils which may or do arise in the field of employer-employee relations" (No. 27, R. 121). This, of course, is no answer to the argument that persons similarly situated within the general purview of the legislation have not been similarly treated and that thereby the equal protection guaranteed under the Fourteenth Amendment has been denied. *Lawton v. Steele*, 152 U.S. 133; *Frost v. Corporation Commission*, 278 U.S. 515; *Southern Railway Co. v Green*, 216 U.S. 400.

The discussion under Section III of this brief indicates at a minimum the following:

Since the absolute prohibitions against the making of union-security agreements are demonstrably arbitrary and discriminatory, since no real public interest is in fact thereby served but only the interests of a private few, and since the extent of the deprivation is entirely incommensurate with the evils reasonably to be feared and such evils could readily have been reached by regulation rather than prohibition, the anti-union-security laws in question violate the Fourteenth Amendment and must be stricken down even though rights of a less fundamental nature than those discussed in Section II are here involved. *Nebbia v. New York, supra; Treigle v. Acme Homestead, supra; Adams v. Tanner, supra.* There is simply no rational basis in the protection of any public, as distinguished from private, interest for the total prohibitions here imposed; if the justifications advanced are deemed sufficient, then there is no traditional activity or institution in our society which similarly cannot be proscribed. The Constitution contemplates that State interference with individual liberties be kept at a minimum. While organized labor is the first to appreciate the need for social experimentation by the State, such need cannot justify a wanton destruction of deeply-rooted institutions at any time the police power is ostensibly invoked.

CONCLUSION

Few cases since *Thornhill's* have had implications affecting the American labor movement as deeply as the cases at bar. These cases will determine the extent of state prerogative not only to remove traditional subject matters from the field of collective bargaining, but also to proscribe, unconditionally, an institution coeval with trade unionism itself and without which institution, absent factors of state protection, organized labor must inevitably disintegrate into debility. The prohibitions of the three enactments herein involve far more than the regulation of labor unions which this Court indicated was permissive in the *Thomas* case; rather they trespass upon, in a very real and practical manner, the domains set apart for free assembly as exercised by workingmen in the conduct of their everyday affairs. It is respectfully urged, upon the authorities and arguments presented above, that this Court declare the anti-union-security prohibitions of the States of Arizona, Nebraska and North Carolina invalid as contravening the federal Constitution.

Respectfully submitted,

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27, 34, & 47

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 27

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL.,
Appellants,

vs.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

No. 47

LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL.,
Appellants,

vs.

NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION

No. 34

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, ET AL.,
Appellants,

vs.

STATE OF NORTH CAROLINA

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THE CLOSED SHOP
AND
UNION SECURITY

ECONOMIC BRIEF
of the
AMERICAN FEDERATION OF LABOR

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1947

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I. CLOSED SHOP: ITS MEANING AND DEVELOPMENT

A. The Meaning of "Closed Shop"

A law prohibiting a private contract which requires membership in a labor organization as a condition of employment is directed against not only the so-called "closed shop." Such a law strikes at the roots of security of the union as an institution. It would reach and effectively destroy a number of other contractual forms gradually developed and firmly established, by agreement of labor and management, to safeguard labor organizations against annihilation.

The term "closed shop" is often used to describe what should be properly termed the union shop. The designation "closed shop" was devised by anti-union employers. It has been utilized in their campaigns against unions as a propaganda slogan, a phrase implying something restrictive or obnoxious. Actually under a union shop agreement which has been labelled as a "closed shop", no worker is barred from the opportunity of employment. Any wage-earner qualified for the job is welcomed into the union and into the establishment operating under a union agreement. In fact labor organizations everywhere urge workers to enter the open door of the union. On the other hand, the so-called "open shop" may be restricted to non-union workers; it is closed to union men, no matter what their skill or competence. Or, a non-union shop may be one in which a few union men have been tolerated and employed but in which there has been no recognition of the union and no collective bargaining.

In a union shop, or the so-called "closed shop", a worker must become a party to a system of representation which makes collective bargaining possible. Without such representation, there can be no collective bargaining. The basic

difference, therefore, is not between the "closed shop" and "open shop", but between the union shop and non-union shop. In its very essence, it is the difference between collective bargaining and individual bargaining.

The above statement is not a partisan contention. An article entitled "Closed Shop and Open Shop" in the Encyclopedia of Social Sciences, written by Dr. William M. Leiserson, former Chairman of the National Mediation Board, states:

> "A closed shop, as popularly understood in the United States, is a place of employment where none but union members may work. An open shop, according to its formal definition, is a place where workers are employed regardless of union affiliation and where unionists and non-unionists may work without discrimination. This formal definition is intended to imply a certain ethical superiority for the open shop over the closed shop, and employers who are opposed to labor unions attempt to press this advantage still further by spreading the use of the term 'American Plan' as a synonym for open shop. It is to be noted that a place that is closed to union members, where none but non-unionists may work, is commonly called an open shop.
>
> "These names, however, are but battle cries in the conflict between employers and labor organizations over the problem of unionization. They serve to obscure the essential point of contention, which is whether the shops shall be union or non-union. Many unionists therefore have insisted, vainly, on the substitution of the designations 'union shop' and 'non-union shop.' If terms of employment are fixed by mutual agreement between an organization of workers and their employers the places covered by such agreements are union shops. If workers are employed individually on terms which the employers stipulate then non-union shops are maintained. The difference between the two types of shops thus hinges on whether wages and other conditions of employment are fixed by collective bar-

gaining or individual bargaining. This is the crux of the controversy between labor organizations and employers, which the ethical implications in the words open, closed and American tend to obscure."[1]

As also stated in a standard text, *The Economics of Labor*, by Millis and Montgomery:

> "To the spokesman of labor organizations in the past, the terms 'union shop' referred to a situation of recognition of the union on the part of the employer and collective bargaining with it; the 'non-union' shop, in this terminology, was one in which the union was not recognized and, of course, collective bargaining did not obtain. Employers, on the other hand—particularly those of antiunion predilections—preferred to use the terms 'closed shop' and 'open shop' (or in the years following the First World War 'closed shop' and 'American Plan'). It is patent that under the 'union shop' as just defined two general types of situation might prevail: the requirement of union membership as a condition of employment, or—although the union was recognized and the employer bargained with it—the absence of this requirement. Employers when speaking of the 'closed shop' generally referred to the former of these two situations."[2]

Historically, the term "closed shop" originally carried not its present, but just the opposite meaning. The term closed shop initially meant an establishment which was "closed" to union men because only non-union workers were employed there. The term was given its present usage when the National Association of Manufacturers raised a battle cry of the "open shop" at its New Orleans Confer-

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[1] *Encyclopedia of Social Sciences*, Volume 3 (1930), pp. 568-569.

[2] *The Economics of Labor*, by Harry A. Millis and Royal E. Montgomery, Vol. III, "Organized Labor" (1945), p. 473. The study states further: "Until recently at least, most of the employers' fight has been to thwart unionization and collective bargaining, and with that object in view employers have maintained their own closed shop." p. 474.

ence in 1903. Anti-union employers were quick to give wide currency to the new meaning of the term, using the phrase "closed shop" as a term of opprobrium and "open shop" as an attractive and fine-sounding designation.[3]

Since that time, organized labor has always objected to the use of the term "closed" shop because of its origin and warped connotation. However, since this term has had wide usage in legal writings, we utilized it here, employing the following terminology used by the U. S. Department of Labor in its industrial relations studies:[4]

Closed shop—All employees are required to be members of the appropriate union at the time of hiring, and they must continue to be members in good standing throughout their period of employment. Employer recruits through the union unless the union is unable to furnish suitable persons within a given period, but persons hired elsewhere must be members of the union when starting work.

Union shop with preferential hiring—While employees need not be union members when entering employment, they are required to join the union within a specified probationary period, generally 30 or 60 days. In addition the employer agrees that union members shall be given preference in hiring when vacancies occur.

Union shop—New employees need not be union members when hired, but must join the union within a specified length of time, usually 30 to 60 days, and remain members during the period of employment.

Maintenance of membership—All employees who are members of the union at the signing of the agreement and

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[3] The real distinction between the "open" and the "closed" shop is well stated in Peter Finley Dunne's "Mr. Dooley on the Open Shop", quoted in Appendix A, *infra*.

[4] See "Collective Bargaining and Union Recognition," *Monthly Labor Review*, April, 1946, p. 569.

all who later join the union must retain their membership for the duration of the agreement. Many of these agreements permit a 15-day period at the beginning of the contract during which members may withdraw from the union if they do not wish to retain membership for the duration of the agreement.[5]

All state enactments adopted in 1947, although popularly termed as "anti-closed shop", would emasculate or destroy not only the closed shop, but every one of these forms of union security.

B. Historical Growth of the Closed Shop

1. *Early Development of the Closed Shop*

The institution of the closed shop was established centuries ago. Far from being peculiar to the modern industrial era, its existence may be traced back to ancient Greece and Rome. It was well developed among craftsmen in the Middle Ages and, despite repeated repression and attack by employers and the State, has come down through the years to our time.

In the 12th and 13th centuries, the masters of the English guilds used the closed shop principle in order to obtain control over a particular trade or craft in a given locality.[6] Following the demise of the guild system, the craftsmen themselves formed fraternal organizations to safeguard the

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[5] Other forms of agreement to safeguard the union status include the *preferential shop*, where union members must be hired when available, but if the union cannot supply workers, the employer may hire non-members and *maintenance of union dues* (requiring check-off of dues as a condition of employment).

[6] "Under Henry I (1100-33 A. D.) the weavers were given a charter which, among other rights, provided that—'Nobody except by them shall introduce himself, within the city, into their mystery and nobody within Southwark or other places belonging to London except he be a member of their guild.' These privileges were confirmed by Henry II."—*Craft Unions of Ancient and Modern Times* by John P. Frey, Washington, 1945, p. 51.

wage and skill standards of the trade. Refusal to work along with non-members was traditional among them.

Frequently the early closed shop of the guilds and craftsmen was enforced not only by these groups, but also by public authorities. For example, a law promulgated by King Richard II declared that: "No shoemaker or cordwainer shall use the craft of tanning, nor tanner the craft of shoemaker."[7]

The closed shop system, firmly rooted in the British guild experience, was early transplanted to American soil. Attempts to enforce a closed shop rule in the American colonies were made as early as 1644 by butchers and shoemakers.[8] In 1667 the teamsters of New York City petitioned the city and received a closed shop. Evidence is also available of similar arrangements establishments for such trades as carpenters, bakers and brewery workers of the city at that time.[9]

As American industrial life expanded, trade unions gradually developed. The first unions were organizations of the skilled groups of workers who had combined in order to deal with the master craftsman by whom they were employed. With the development of the factory system and the growing division of functions and responsibilities between employers and employees, trade unions gradually assumed their present role of representing workers for the purpose of collective bargaining with their employers and other forms of mutual aid and protection.

The early trade unions developed rules and regulations governing the relations between union and non-union workers. Documentary evidence covering this early period of American trade unionism is sufficient to demonstrate that

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[7] 13 Rich. II, c. 12 (1390).

[8] *A Documentary History of American Industrial Society*, edited by John R. Commons and others, Vol. III, p. 21.

[9] *New York Historical Society Collections*, Vol. XVIII, p. 557.

many unions actually established the closed shop agreements with employers.

The cordwainers of Philadelphia, who set up their first permanent organization in 1794, and other cordwainers' societies, at the outset adopted a rule that the employer should retain none but society men in his shop.[10] The carpenters of Philadelphia, who formed a protective organization as early as 1724, adopted by-laws in 1817 requiring the maintenance of closed shop conditions.[11]

In the first half of the nineteenth century, the earliest full development of the closed shop was reached in the printing industry. For example, the union then known as the New York Typographical Society, on July 22, 1809, adopted a by-law providing that no member of the Society should "engage or continue working when there is a journeyman working for less than the established price."[12] According to this rule, union members were required to abandon working for an employer who had hired a non-union journeyman receiving less than the union's wage scale. Although at first used intermittently, this rule soon became firmly established in the trade.

By 1840, it became quite common for unions to adhere to rules whereby any union members were prohibited from working with non-union workers, regardless of what wages the latter might be paid. This is illustrated by the following clause in the constitution of the Baltimore Typographical Society of 1842: "Every person working at the business will be required to make application to join this Society within one month from the time of his commencing work at any office in the city. . . . On the refusal or neglect to comply with regulations contained in the foregoing sec-

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[10] Commons, *op. cit.*, Vol. I, p. 130.

[11] *Ibid.*, p. 81.

[12] Barnett, "The Printers: A Study in American Trade Unionism", *American Economic Association Quarterly*, October, 1909, p. 282.

tions, or in case of the rejection of the application, . . . the members of this Society shall cease to work in any office where such person may be employed."[13]

In many other unions the development of a closed shop policy closely paralleled that of the typographical union. In addition to the printers, Dr. Stockton's thorough study lists the following unions which adhered to this practice before the Civil War:[14]

> Journeymen Cordwainers, Journeymen Carpenters, Cigar Makers, Journeymen Tailors, Hollow Ware Glass Blowers, Iron Molders, Journeymen Hatters, Shoemakers, Benevolent and Protective Association of United Operative Mule Spinners of New England, Carpet Weavers, Stone Cutters, the Potters, the Iron, Steel and Tin Workers, and the Longshoremen.

The Cigar Makers' Union in 1856 enforced the closed shop in New York and Philadelphia in order to maintain the established wage, resorting to the weapon of the strike.[15] Hollow Ware Glass Blowers advocated a closed shop policy in 1858, as did the Mule Spinners of New England.[16] The Potters, the Longshoremen, the Iron, Steel and Tin Workers, and the Iron Moulders gradually introduced the closed shop in the establishments where they had a considerable majority.[17]

Summing up, Dr. Stockton states: "If the available evidence is summed up, it may be said that practially every trade union formed prior to the Civil War was in favor of excluding non-members from employment."[18]

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[13] *Baltimore Typographical Society Constitution*, 1842, Article 6.

[14] *The Closed Shop in American Trade Unions*, by Frank T. Stockton, Johns Hopkins Press, 1911; pp. 29-37.

[15] *Ibid.*, p. 27.

[16] *Ibid.*, p. 29.

[17] *Ibid.*, p. 28-32.

[18] *Ibid.*, p. 34.

Throughout the 19th century, the movement towards the closed shop continued to grow. In most cases the closed shop or some form of regulation restricting the relationship between union and non-union workers was applied on a local basis. Beginning about 1870, according to Dr. Stockton, "The national Unions, or a very large part of them made the maintenance of the closed shop a national rule, and required the local organizations to enforce it as effectively as possible." [19]

2. *The Closed Shop in Modern Industrial America*

As the trade union movement grew, employer opposition to its expansion became more vocal and more strongly organized. This became particularly evident at the turn of the 20th century. When the country recovered from the 1893-1896 depression, trade union membership began to increase rapidly. Membership in the American Federation of Labor rose from 264,825 in 1897 to 1,676,200 in 1904.[20] The affiliation of existing independent unions accounted for but a small part of this increase; most of it reflects the growth in trade union membership during those years.

The reaction to this growing importance of trade unionism was expressed in the launching of an "open shop" drive by the employers. This activity was spearheaded by the leading employer organizations, notably the National Metal Trades Federation and the National Association of Manufacturers. Throughout the country these and other employer associations were instrumental in forming local "Citizens' Alliances" and similar groups for the purpose of combating the closed shop.

At the national level a number of these associations were banded together to form the "Citizens' Industrial Associa-

[19] *Ibid.*, p. 57.

[20] American Federation of Labor, Report of the Proceedings of the 65th Convention, 1946, p. 43.

tion of America", whose first president was the head of the National Association of Manufacturers. The avowed purpose of each of these organizations was to fight the "closed shop" and to substitute the "open shop" for it. However, the ac ty of these groups soon made it evident that they were ectly interested in preventing the spread of any type of unionism, regardless of whether the union advocated the closed shop.[21]

While this concerted drive, launched against the closed shop at the turn of the century, succeeded in making inroads into the union security provisions of collective bargaining agreements and in impairing wage standards, its total effect was to solidify the labor movement as a whole and give it a sense of solidarity. Dr. Stockton's study shows that the older, more established unions were less severely affected by the drive. Where the closed shop agreements were tested by experience, the employers showed willingness to continue their acceptance at the same time, many of the newer unions were forced to retreat on the issue of union security and to accept lower wages. However, during this period the union movement in its entirety was able to make progress in the face of the opposition.[22]

Although the intensity of the fight over this question abated somewhat between 1908 and the end of the first World War, the closed shop issue remained prominent. Organized employer opposition to the closed shop once again became violent at the conclusion of the first World War. Once more employer groups, spearheaded by the NAM, organized a systematic "open shop" drive, launched under a new and captivating slogan of "The American Plan." Again, al-

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[21] For a concise, yet thoroughly documented, account of the open shop drive of 1900-1908, see *History of Labor in the United States*, Vol. IV, by Selig Perlman and Philip Taft, New York, 1935, Chapter XIII, "The Employers' Mass Offensive," pp. 129-137.

[22] Stockton, *Op. cit.*, pp. 54-57.

though the proclaimed object of the drive was the closed shop, in reality the attack was directed against all phases of collective bargaining and against all unions. The real purpose of the drive was to undermine the labor movement and to destroy the membership gains labor had made during the war.

In the national emergency of the first World War, as in the more recent world conflict, organization of workers in unions proved to be a foremost instrumentality for positive and effective cooperation between labor and government. As stated by the outstanding historians of labor organization in the United States:

> "With the entrance of the United States into the war the problem of labor became the paramount problem. The war industries, spurred on by war-time profits, staged a reckless competition for labor. The American Federation of Labor had shown readiness to come to the governments's assistance. Organized labor was strategically placed not only for giving support to the government's decision to make war but also to prevent chaos in the labor market." [23]

Led by the A. F. of L., organized labor not only aided the government in the effective prosecution of the war, but also effected an agreement with organized employers in the establishment of agreed wartime labor policies. The first National War Labor Board, established in March 1918, by joint agreement between employers, represented by the National Industrial Conference Board and labor, represented by the A. F. of L., left a profound mark upon the wartime structure of union organization and the collective bargaining process of that time. The agreed policy of the Board was to "freeze" the already existing closed shop agreements. While the Board's policy was to recognize the

[23] *History of Labor in the United States, 1896-1932*, Vol. IV, by Selig Perlman and Philip Taft, p. 403.

principles of self-organization and collective bargaining and to protect union members against discrimination in employment, its decisions merely accepted the previously established closed shop agreements, without extending the principle of union security to situations where it had not been achieved before.[24]

The effect of this policy was to prevent the application of union shop security to labor organizations whose membership grew rapidly during the war period. Another policy of the Board was to promote a standard employee representation plan in unorganized or partly organized establishments, with agents of the Board supervising elections. This provided the framework for employer-dominated and financed company unions, widely used by employers to combat trade and labor unions after the war.[25] The combined effect of these policies of the first National War Labor Board was to contribute heavily to the insecurity of labor organizations in the period immediately following World War I. Deprived of a contractual framework for preserving their organizations against attack, the newly-formed and newly-expanded unions were driven to reliance on militancy for self-preservation. The absence of the closed shop as a means for organizational security among the war-grown unions contributed heavily to the intense industrial strife which ensued in such major industries as steel, coal and meat packing and in other sectors of the postwar economy.

The Industrial Conference convened by President Wilson in October 1919, broke up over the question of union security. It was set up as a tripartite conference of representatives of labor, management and the public, but strangely enough men like Judge Elbert H. Gary, head of the United States

[24] *National War Labor Board*, Bulletin of the U. S. Bureau of Labor Statistics, No. 287, 1922.

[25] Perlman and Taft, *op. cit.*, p. 409.

Steel Corporation and John D. Rockefeller, Jr., were invited as the leading representatives of the public. The public group, led by Gary, Rockefeller and William L. Chadbourne, a prominent attorney, offered a resolution which ended with the assertion that the right of self-organization and collective bargaining "must not be understood as limiting the right of any wage earner to refrain from joining any organization or deal directly with his employer if he chooses."[26] In other words, the resolution proclaimed the principle of the open shop. It was thus the employer's insistence on the elimination of the closed shop that launched the costly and well-organized drive of industrialists against unions.

The story of this postwar open shop drive is familiar and need not be detailed here. The new "open shop drive" under its new and beguiling name of the "American Plan" made its appearance late in 1919 as part of the employer offensive against the gains made by unionism during the first World War. From 1914 to 1920, the membership of the American Federation of Labor more than doubled, increasing from 2,020,671 in 1914 to 4,078,740 in 1920.[27] Organized labor, through its efforts during the war, had attained a greater degree of importance in the nation's economy than it ever had before. A number of industrialists combined in their determination to destroy these gains.

The aims and methods of the employer campaign have been aptly summarized by America's foremost historians of labor in their standard treatise:

> "The employer's campaign to liquidate labor's wartime gains was conducted on the front of ideals and

[26] *Proceedings of the First Industrial Conference*, Washington, 1920, p. 250.

[27] Report of the Proceedings of the 65th Convention of the A. F. of L., p. 43.

> sentiments as well as on the more tangible industrial one. The campaign was designed to display as its objective the return to time-hallowed American principles, the inalienable right of every American to enter any trade or business he chose, to accept employment under conditions satisfactory to himself without interference from the union business agent. . . . The promoters of the American Plan benefited from the improved methods for creating mass opinion developed during the war. The American Plan purported to abolish the "un-American" closed shop, but as in previous open shop crusades, the destruction of unionism was the real objective. Neither effort nor money was spared in this crusade. By the end of 1920, the country was covered with a network of open shop organizations." [28]

Industrial warfare over union recognition and union security became widespread. It was most intense in the maritime, printing, packinghouse, garment, textile, and building and construction industries. While the older, longer-established trade unions were better able to withstand this attack, relying on the union shop provisions of their contracts, many of the newer unions were soon forced to give ground and some were completely destroyed. Membership of the American Federation of Labor dropped almost a million in the two years following 1920.

For most wage-earners the prosperity of the "fabulous 'twenties" was badly mitigated by the failure of wages to yield an adequate income and for employment to keep steady. Between the fourth quarter of 1920 and the fourth quarter of 1921, average hourly earnings in 24 manufacturing industries declined from 60.7 cents an hour to 49.0 cents an hour. Even at the peak of the boom in 1929, these earnings failed to regain the 1920 level, with the hourly

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[28] Perlman and Taft, *op. cit.*, p. 491.

earnings of 59.2 being the prosperity peak, reached in 1929.[29] Moreover, these earnings were by no means steady. There was little concerted effort on the part of management to stabilize employment, and seasonal fluctuations in employment were often extremely wide. Even apart from seasonal interruptions, employment was intermittent. The depression of 1921 was followed by the recession of 1924 and the beginning of the general depression five years later, with unemployment becoming widespread much sooner in such occupations as the building trades, where the decline began in 1926.

The open shop drive succeeded in wiping out unions in the key steel industry. In coal, the employers' open and flagrant repudiation of their contractual obligations under the Jacksonville Agreement of 1924, led to successive waves of wage-cutting. In other industries cut-throat competition exerted a downward pressure upon wages. With most unions weakened and some completely routed, the absence of firm wage standards permitted destructive and disastrous wage competition. The open shop and company union drives of the 'twenties, to the extent that they contributed to the drying up of the buying power of the workers, also contributed to the making of the Great Depression with its calamitous results to workers and employers alike.

The subsequent recovery of the mid-'thirties was accompanied by the organization drive launched by the A. F. of L. in 1933 and a rapid expansion of union membership. Had it not been for the enactment of the National Labor Relations Act in 1935, however, with its legal recognition of the validity of closed shop agreements, these gains would have soon been dissipated by the same organized opposition as was generated by the union growth in 1899-1906 and dur-

[29] *Wages in the United States, 1914-30*, National Industrial Conference Board, 1931, p. 44.

ing the first World War. The presence of Section 8 of the Labor Relations statute, with its closed shop proviso, contributed vastly to the stability and maturity of contractual collective bargaining relations.

With America's entry into the second World War, the American Federation of Labor once more took the initiative in proposing, by agreement between labor and management, the creation of the second National War Labor Board. When the Board was formed in January 1942, no attempt was made to formulate in advance "principles and policies" as was done by the earlier Board. Soon the NWLB evolved a policy whereby the Board would approve any closed shop agreement directly negotiated by labor and management, but where the question of union security was left to the decision of the Board, it would not go beyond the so-called maintenance of membership provision as a basis for settling the dispute. Requiring that all employees who are members of the union at the signing of the agreement directed by the Board, and all who later join the union, must retain their membership for the duration of the contract, the maintenance of membership formula provided a basis for union security for a large number of unions in many industries and trades. In 1946, of the total number of workers under agreement, 25 percent were estimated to be in unions protected by the maintenance of membership. The proportion was higher in manufacturing, where it was estimated to be 38 percent.[30]

Anti-closed shop enactments would, as a rule, destroy the maintenance of membership form of union security, further undermining the stability of labor-management relations in a major portion of American industry and trade.

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[30] *Extent of Collective Bargaining and Union Recognition, 1946*, U. S. Department of Labor, Bureau of Labor Statistics, published April 21, 1947.

II. PREVALENCE OF THE UNION SHOP PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS

The closed shop and the union shop are not only among America's oldest institutions, whose development parallels the growth of our nation's industrial power, but they have also gained wide acceptance and general prevalence in the industry and trade of the land. In apparel manufacturing, food manufacturing, printing and publishing, textiles, mining, trucking and warehousing, to name but a few major industries, the closed shop and the union shop form a firm basis for long-established collective bargaining relations between labor and management. They have become a part of the very fabric of day-to-day and year-to-year relationships between workers and their employers.

The Anti-Closed-Shop enactment blindly cuts through these closely-knit relationships. It destroys the equities in the security of their self-organization workers have built up over a period of years and at the same time deprives employers of the contractual means whereby they can rely upon the union, as they have in the past, for the maintenance of discipline and responsibility among their employees.

It does more than that. Although the State enactment is purportedly directed solely against the closed shop and is designated as Anti-Closed-Shop enactment, in reality it reaches all effective forms of union security established by mutual consent and contractual agreement between labor and management. All such union security arrangements achieved through collective bargaining, ranging from the closed shop to the maintenance of membership, reached by this enactment will be destroyed.

To determine the full scope of the impact of the Anti-Closed-Shop enactment upon the labor-management relations in this State, and, by precedent, in other States, it is

necessary to consider the prevalence of such union security provisions in American industry and trade.

According to the Bureau of Labor Statistics, in 1946, approximately 31,200,000 workers were employed in occupations eligible for coverage by union agreements.[31] Nearly half of this total, or 14,800,000 workers were employed under conditions determined by written collective bargaining agreements between unions and employers.[32]

In 1946, there were 7,451,000 workers in this country employed under either closed shop or union shop contracts. This meant that just over one-half of all workers employed under any type of union agreement, were under closed shop and union shop contracts.

In addition, there were 3,695,000 workers employed under union maintenance of membership contracts. In other words, a total of over 11.1 million workers were employed under the various forms of union security aimed at by the Anti-Closed-Shop enactment. This total was distributed as follows:

Form of Union Security	Workers Covered
Closed Shop	3,357,000
Union Shop with Preferential Hiring	1,497,000
Union Shop	2,597,000
Union Maintenance of Membership	3,695,000
Total	11,146,000

(Source: Bureau of Labor Statistics)

[31] In July 1946 a total of 39,265,000 workers were employed in non-agricultural establishments. The Bureau of Labor Statistics estimate of 31,200,000 workers eligible for union-agreement coverage includes all wage and salary workers except those in executive, managerial and some professional positions, but excludes all self-employed, domestic workers, agricultural wage workers on farms employing less than 6 persons, Federal and State government employees, teachers, and elected or appointed officials in local governments.

[32] Except as otherwise noted, all data in this section are from the official estimates of the Industrial Relations Branch, Bureau of Labor Statistics, U. S. Department of Labor. See especially, Bureau of Labor Statistics,

Union security is not the exception but the rule in labor-management relations maintained through collective bargaining. The great preponderance of collective bargaining agreements in America are union security agreements making union membership a condition of employment. This is shown by the following table:

Extent of Union Security Provisions In Collective Bargaining Agreements in 1946

Industry Group	Total Employees Under Agreement	Total under Security Clauses	Percent. under Security Clauses
Manufacturing	7,900,000	6,762,000	85.6
Non-manufacturing	6,900,000	4,384,000	63.5
Total	14,800,000	11,146,000	75.3

(Source: Bureau of Labor Statistics)

These figures make it clear that attack on union security provisions of agreements is an attack on collective bargaining agreements themselves. Under conditions existing in industry today and in view of the antagonistic attitude prevailing among employers toward self-organization of workers, a prohibition of union security agreements must inevitably lead to a far-reaching impairment of the effectiveness of unions as an instrument of the workers' mutual aid and protection.[33]

III. ECONOMIC VALUE OF THE CLOSED SHOP AND UNION SECURITY

1. *Unions Cannot Effectively Perform Their Economic Function Without Union Security*

To be properly judged, the value and effectiveness of the closed shop and other related forms of union security must

"Extent of Collective Bargaining and Union Recognition," Release of April 21, 1947.

[33] More detailed data on the extent of union security provisions, showing the number of workers covered by various types of union security clauses in specific manufacturing industries, will be found in Appendix B.

be viewed in the light of their contribution to the broad public welfare. The tangible measure of the economic welfare of the people is their standard of living. The standard of living reflects the ability of breadwinners to provide out of their incomes food, housing, clothing, fuel, transportation, medical care and other goods and services necessary to maintain themselves and their families. The only available measure of the living standard is real income, that is, money income adjusted for price changes. Real wages are the best available measure of the standard of living of wage-earners who comprise the largest group in our population. That the closed shop and union security can contribute greatly to the improvement and maintenance of the standard of living of wage-earners and that they have made this contribution in the past, is a demonstrable fact.

The primary purpose of trade unions is the mutual aid and protection of their members. By acting jointly, workers can safeguard and advance the standards of their work, their wages and their working conditions. This the workers cannot do individually. An individual worker must accept the terms set by the employer, or face unemployment and privation.

The instrumentality of collective bargaining and the basis of union-management relations is the union agreement. It is this agreement which governs terms of employment of all workers subject to it and provides orderly means for the adjustment of grievances and disputes. The trade union agreement is a continuing instrument. It provides a basis for stability in labor-management relations. It establishes a continuing basis of fixed responsibility on the part of both labor and management. On either side, the acts of one man or a group of men cannot be disowned or responsibility for them shifted; the union becomes responsible for all actions of workers, over which it has control, related to employment and the management for all actions of its

agents in dealing with employment. The trade union contract fixes that responsibility for a term, renewable by mutual agreement of union and management representatives.

This continuous operation of the trade union agreement serves to stabilize the terms of employment. The agreed terms in time become standards applicable to the trade and occupation concerned. Though far from inflexible, because they are always tested by negotiation and agreement in the light of changing methods and economic conditions, these standards become a frame of reference for establishing just compensation elsewhere for similar work and under like conditions. They provide to all workers and employers a proper and practical reference to fair terms that can be achieved and maintained voluntarily under practical operating conditions.

Similarly, the means and methods for removing causes of complaints, for adjusting grievances and settling disputes, tested by experience and improved with each renewal of the agreement, become standardized and strengthened by the established proof of their workability. As the result, the trade union agreement provides a practical basis for what Professor Slichter has called "industrial jurisprudence" in labor-management relations and what may be more accurately described as the "common law" of industrial relations. Periodically perfected in the light of tested experience, the procedures established by collective agreement become precedent-making and serve as effective guides for the best and most equitable way to settle grievances and adjust disputes.

All this collective bargaining can accomplish through the trade union agreement, provided union security has been assured. This is shown by the record of higher labor standards and more mature and stable industrial relations in the areas of employment covered predominantly by the closed

shop, the union shop, or the union membership maintenance,[34] as compared with areas where union security has had little or no acceptance. Collective bargaining is truly workable and yields lasting benefits to both labor and management and to the whole community where the union itself is assured security, where it does not have to dissipate its resources in fighting for its very survival. Joint programs of union-management cooperation for greater efficiency and higher productivity have shown lasting effectiveness only where union security has been fully established.[35]

Where unions have been weak and insecure, employers often organized all the resources at their command to undermine them and to prevent the advent of collective bargaining. As Bishop Sheil puts it, "the necessity for labor organization is made more acute by the fact that the employers are strongly organized in their own behalf. The Directory of the U. S. Department of Commerce under 'Selected Trade Associations of the United States' lists over twenty-four hundred such associations. And as labor should now well know, many of the members of these organizations are leagued together 'to fight labor'." [36]

The story of the sweatshop, of workers unconscionably underpaid by highly profitable non-union business enterprises is well-known and need not be recited here. The employer, whether driven by cutthroat competition or by greed, has always tended to drive the hardest wage bargain

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[34] Or, as in the case of railroads, where union security is at least given a measure of assurance by statutory recognition of standard national labor organizations.

[35] E. g. International Ladies' Garment Workers Union, International Printing Pressmen and Assistants' Union, among a number of unions maintaining long-established union-management cooperation programs. Closed shop and union shop agreements have proved to be a prerequisite to the long-term success of all such plans.

[36] Sermon delivered by the Most Reverend Bernard J. Sheil, D.D., Bishop of Chicago, September 4, 1944.

he could with his employees.[37] Substandard wages have been the eloquent result of individual bargaining and the inequality of bargaining power between an individual employee and his employer. It was this drive for the lowest possible wage that has impelled employers to use every means of preventing organization of their employees into unions. It was this drive for low wages that has prompted many employers in the past to require individual employees to sign the so-called "yellow-dog" contract, compelling them to state, as a condition of employment, that they were not and would never become members of a union. And it was the same low-wage drive that gave impetus for the repeated far-flung open shop drives, designed to break unions.

To gain recognition and to survive, unions have had to wage a long, bitter and costly battle. The lives of many workers have been lost in the cause of labor organization. Even today, when the right of collective bargaining is the law of the land, in many sections of industry unions are regarded as enemies by employers and are resisted by open and by subtle means.

These facts and the history of the development of the closed shop and union security[38] make it plain that there

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[37] This fact has been recognized by Congress in the Findings stated in Section 2 of the Fair Labor Standards Act of 1938 (Public No. 718, 75th Congress). Section 2(a) of the Act states: "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

[38] See Part I (1) of this brief.

can be no true collective bargaining and that the union cannot effectively perform its functions, unless its existence is made secure. The historical record we have cited proves that effective unionization and union security go hand in hand. The closed shop, the union shop and related forms of union security have been at the core of American trade unionism. They are essential to the performance of the union function of protecting and advancing standards of wages and working conditions. Without union security the effectiveness of unions is lost. Deprived of union security, trade unions are no longer able to safeguard wage and labor standards, with dire results to the economic welfare of the whole nation, as will be presently shown.

2. *Union Security Leads to Higher Wage Standards*

Union wages are higher wages. This fact is so generally established and so well known that it requires no special proof. Wage records in a wide variety of industries and trades, extending over many decades, provide voluminous and unassailable evidence of the fact that union-established wage standards resulting from collective bargaining negotiations are substantially higher than wages prevailing in the unorganized portions of the same occupation, trade or industry.

These records show, for example, that during the 1890's and the initial years of the twentieth century, occupations and industries under union agreements maintained substantially higher wages and shorter hours than those in comparable nonunion establishments.[39] It will be recalled

[39] Compare *Real Wages in the United States* by Paul H. Douglas; esp. pp. 562-563. Professor Douglas not only compares relative wage increases in union and nonunion groups but also cites the experience of specific union industries at that time. He states: "Thus the earnings in the bituminous coal fields were greatly increased as a result of the unionization of the fields in 1897."

that the Open Shop Drive of the early 1900's was launched by organized employers to counter the closed shop and the wage gains it had enabled the workers to achieve. [See Part I (2) of this brief.]

Similarly, following the first World War, the extension of unionization and the spread of the closed shop brought about a marked advance in the wage standards in unionized industries compared with those unorganized.[40] Once more these wage gains prompted many employers to join hands in another costly and ruthless Open Shop Drive to weaken unions, curb the closed shop and drive down the wage standards attained by unions. This drive was launched late in 1920 under the name of "American Plan" and was once again directed against the closed shop [See Part I (2) of this brief]. Once again such a drive had considerable success in weakening and even destroying unions and in levelling off some of the relative gains attained under union agreements.

To determine the relationship of wage rates in union and nonunion portions of the same industry over a period of years and test the validity of the influence of organization under union shop conditions on wage disparities, we have made the following percentage comparison of wage rates in bituminous coal mining between 1919 and 1946, with average wage rates prevailing in the Southern portion of the industry shown as a percentage of such rates prevailing in the Northern portion of the industry in the same year.

[40] Professor Douglas says: "The experience of the Amalgamated Clothing Workers in the men's clothing industry has been very similar. The unionization of the important centers in 1919 was accompanied by a very sharp advance in both money and real wages, amounting to a gain over 1918 in relative purchasing power of 120 percent. The increases thereafter have, however, been much more moderate." *Op. cit.*, p. 563.

AVERAGE WAGE RATES IN SOUTHERN BITUMINOUS COAL MINES EXPRESSED AS PERCENTAGE OF AVERAGE WAGE RATES IN NORTHERN MINES, IN SELECTED YEARS, 1919-1946

Year	Southern rates as percentage of Northern
1919	84
1924	68
1926	70
1929	80
1931	80
1933	77
1934	91
1935	92
1936–37	93
1938–40	91
1941–46	100

Source: Bureau of Labor Statistics, U. S. Department of Labor and Bureau of Mines, U. S. Department of Interior. Because of the limitations of data, the Northern rates available between 1919 and 1933 are those for the Central Competitive area (Ohio, Indiana and Illinois). Between 1934 and 1946, Northern Appalachian rates are compared with Southern Appalachian. While not identical, these Northern rates are comparable.

This comparison shows an intimate relationship between the changing extent of the union shop and the rates prevailing among coal miners. In 1919 unionization was at its peak and extended not only over the Northern coal fields but also well into the South. In 1924 came the wholesale repudiation by the Southern operators of the wage rates established by the Jacksonville agreement, with wage reductions cutting the Southern rates to 68 percent of the Northern rates. Until 1934, the disparity between the predominantly nonunion Southern fields and the predominantly union Northern fields fluctuated within a narrow range. As the union shop was extended into the South, between 1934 and 1941, the differential was greatly narrowed. With all of the Southern mines coming under the union shop after 1941, the wage differential was completely eliminated.

The presence of widespread unemployment further weakens the disparity in the bargaining power between individual employees and their employers, with the resulting willingness of nonunion workers to accept lower and lower pay. Yet there is ample evidence that even under conditions of full employment, comparatively higher wage standards are maintained, as a rule, under union shop conditions. A worker who possesses a specialized skill wants to utilize that skill in his home town, where he has a home, where he goes to church, where he has relatives and friends. Suppose this worker is not a union member and must bargain alone with his prospective employer over pay on the job offered him. If such a nonunion worker is denied by the employer suitable employment at standard pay, he is likely to accept a lower rate, when faced with the alternative of looking for a suitable job in another community and going through a painful and costly process of uprooting himself and his family from his home environment. Under union-shop conditions, on the other hand, this worker's union membership greatly enhances his ability to secure a standard rate of pay for work for which he is most fitted.

The Bureau of Labor Statistics' wage studies provide an extensive array of evidence that the most recent wage rates it compiles directly from payroll reports are substantially higher in union establishments as compared with nonunion shops. A few examples, taken from recently compiled reports, will illustrate this.

AVERAGE HOURLY WAGE RATES IN SELECTED OCCUPATIONS IN GLASS AND GLASSWARE, PRESSED OR BLOWN, IN WEST VIRGINIA, JANUARY, 1947, BY UNION AND NONUNION ESTABLISHMENTS

Selected Occupations (Plant Male)	Union establishments	Nonunion establishments
Batch mixers	$1.00	$.79
Blowers	2.27	2.19
Carry-in boys	.79	.72
Cutters, decorative	1.54	1.05
Janitors	.86	.69
Lehr tenders	.98	.68
Mold cleaners	.96	.74
Tankmen	.99	.84
Truckers, hand	.90	.67
Warming-in boys	.91	.83

Source: Division of Wage Analysis, Bureau of Labors Statistics, U. S. Department of Labor, Survey No. VIII-2-270.

Note: The sample survey included 13 union establishments and 6 nonunion establishments in West Virginia. Wage rates for a number of occupations not reported due to insufficient number of establishments and/or workers to justify the presentation of an average. The 19 establishments employed a total of 5,294 employees, 3,828 male and 1,466 female.

The same report also compares wage rates of plant female employees in a variety of occupational classifications. All wages reported for the nonunion plants are substantially lower than in the union plants, and in some occupations the nonunion wage is as much as 35 percent below the union wage.

Another example is found in a similar report showing average hourly earnings in four union and four nonunion machine tool manufacturing plants in the vicinity of Rockford, Illinois in October, 1946.

AVERAGE HOURLY EARNINGS IN SELECTED OCCUPATIONS IN MACHINE TOOLS IN ROCKFORD ILL. AREA, IN OCTOBER, 1946, BY UNION AND NONUNION ESTABLISHMENTS

Selected Occupations (Plant Occupations—Male—Processing)	Union establishments	Nonunion establishments
Assemblers, Class A	$1.29	$1.18
Assemblers, Class B	1.31	1.02
Drill-press Operators, Radial, Class A	1.36	1.18
Engine-Lathe Operators, Class A	1.37	1.24
Engine-Lathe Operators, Class B	1.28	1.09
Grinding Machine Operators, Cl. A	1.44	1.22
Milling Machine Operators, Cl. A	1.29	1.20
Tool and Die Makers	1.36	1.38
Turret Lathe Operat., Hand, Cl. A	1.33	1.22
Welders, Hand, Class A	1.24	1.12

Source: Division of Wage Analysis, Bureau of Labor Statistics, U. S. Department of Labor, Survey No. 1462.

Note: This survey included 4 union and 4 nonunion establishments located in the Rockford, Ill. area, including Boone, Stephenson, and Winnekago counties, Illinois, and Green and Rock counties, Wisconsin. Wages for some occupations not reported due to insufficient number of establishments and/or workers to warrant presentation of average. The 8 establishments employed a total of 4,594, of whom 4,290 were in plant occupations—male. For further details, see Report of Survey, Serial No. 1462, summarized on Forms OWR-17 and OWR-18.

As will be seen from the foregoing comparison, with the exception of one classification, workers in union plants were earning up to 30 percent more than in nonunion plants for the same work in the same type of establishment. Similar, and even more striking, disparities between union and nonunion rates will be found in hundreds of payroll analyses recently made by the Bureau of Labor Statistics in localities in all parts of the United States.

In making general comparisons between union and nonunion rates, two important considerations must be borne in mind. First, it should be recognized that fear of potential unionization may be a powerful force in nonunionized in-

dustries. In fact, it is well known that in many instances employers have deliberately raised wages under nonunion conditions whenever a drive for unionization or of a closed shop became imminent. A classic illustration of an employer's response to an attempt of his employees to establish a union under closed shop conditions is provided by Martin Quincy Good, who was recently honored as one of the four hundred men who for fifty years or more have been members of Typographical Union No. 6. The union was organized in 1850 by Horace Greeley, the great journalist and statesman and one of the founders of the Republican Party. The occasion related by Mr. Good took place in 1888. The firm was the New York *Tribune*, one of the great dailies of the time. The employer was Whitelaw Reid, then owner and editor of the paper. In the words of Martin Quincy Good:

> "When I heard that the boys at the *Tribune* were setting type on machines, I concluded that machines were the coming thing, so I went down to the *Tribune* and asked for a job. That was in 1888. Been there ever since. I started at twenty-four dollars a week, but when the union lifted the rate in other shops to twenty-seven, Mr. Reid, the publisher of the *Tribune*, raised us to thirty in order to keep the union out. The funny thing about that was that Mr. Greeley, who founded the union, was also the founder of the *Tribune*. Mr. Reid had signs all over the place saying that anyone caught with a union card in his pocket would be discharged. I joined anyway—what they call undercover. In 1892, when Mr. Reid ran for Vice-President on the Republican ticket, all signs against the union were taken down. Bad for politics, you know. Then the shop joined the union in a body."[41]

Secondly, union wage standards tend to exert an indirect influence on wage levels in the unorganized trades. The

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[41] *The New Yorker*, Vol. XXIII, No. 16, June 7, 1947, p. 26. Copyright, 1947, by the New Yorker Magazine, Inc.

very fact that a *standard* is established by union agreements in the trade serves to influence the wage determination in all establishments in the trade, often bringing about a marked lift in the rates prevailing in nonunion establishments.

Nor should the fact be overlooked that unions have a direct interest in raising wages of workers not within the purview of the union organization. Thus the drive for the enactment of the Fair Labor Standards Act and other Federal and State minimum wage laws was led by organized labor. And, upon the enactment of these laws, the actual setting of wage rates by industry committees and wage orders generally depends upon presentation of supporting evidence by organized labor.

But the essential point is that to give the union wage standard a lasting effect, *to maintain a union wage standard over a period of time, unions must have the protection of union security.* As we have seen, in early 1900's, and again in 1920's union wage standards were destroyed in many industries and trades where the union itself was unable to withstand the organized attack of the Open Shop Drive. The wage history of our major trades and industries provides ample evidence of the fact that union security is essential not only for the attainment of a fair wage standard, but also for its maintenance over a period of time.

3. *Union Security Makes a Positive Contribution to the Economic Welfare of the Nation*

As has just been pointed out, the wage record of the past fourscore years demonstrates that whenever unionism is markedly weakened in the industries and trades in which it has become well established, an appreciable decline in the earnings of the workers has been the result. According to

Professors Millis and Montgomery's appraisal of the problem:

> "It has already been noted that during the depression of 1921-1922 employers did not cut wages commensurately with the reduction in the cost of living, and the wage reductions were less severe than they had been during previous depressions. Employers at that time dreaded labor trouble, they saw unionism emerge from the depression with a membership approximately a million and a quarter less than that of the 1920 peak but still a million in excess of the 1914 level, they were acutely conscious of the possibility of unionization of their plants, and in consequence they substituted for the policy of cutting wages commensurately with the reduction in the cost of living the policy of reducing labor cost per unit through introducing personnel and welfare devices, and schemes of employee representation, which were expected to increase both individual and group efficiency. Moreover, even though one accepts the thesis that the chief influence of unionism in advancing wages appears to be manifested during its early stages in an industry, one can recognize the equally important function of maintaining gains already made and preventing what would be the beginning of a general labor underbidding process, extending in its effect to millions of unorganized workers as well as to the unionized group."[42]

As we have also shown, the ability of unions to maintain the wage standards previously gained depends directly on the degree of union security accorded them. We have pointed out, moreover, that wage standards maintained by unions exert a strong influence upon the general wage structure. This leads to the fundamental question, of vital concern to every American, *what part do the wage standards*

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[42] *Labor's Progress and Problems*, by Harry A. Millis and Royal E. Montgomery (*Economics of Labor*, Vol. I), pp. 213-214.

play in the maintenance of maximum production, maximum employment and a high standard of living of the nation as a whole? It is in the light of this question that the role of union security in maintaining union wage standards must be considered.

The maintenance of high national income depends on the availability of consumer purchasing power sufficient to sustain high production of goods and services. This is no longer a matter of dispute but is backed by overwhelming factual evidence derived from the historical analysis of the operation of our economy.

This evidence indicates that between 1869 and 1939 the output of the American economy amounted to about $2,800 billion in 1939 prices. The flow of commodities to consumers accounted for 90 per cent of this total. Housing accounted for an additional 2 per cent. If we classify residential buildings as consumer goods, as they properly should be, the proportion is raised to 92 per cent. The remaining 8 per cent included the production of all new industrial plants, business structures, public works and improvements and addition to inventories (as well as additions to claims against foreign countries).[43]

This long term evidence shows that the flow of consumer goods and services is the mainstream of the nation's economic life and that our ability to sustain the building of new houses, factories, roads, machinery and other capital goods is dependent on the maintenance of effective purchasing power, able to support the production of consumer goods and services.

Wages comprise a major proportion of national income. Between 1922 and 1938, compensation of employees fluctuated between 59 and 74 per cent of the total income of the

[43] *National Product Since 1869*, by Simon Kuznets, National Bureau of Economic Research, Inc., 1946. See also his *National Income: a Summary of Findings*.

ration. During the same period, dividends never exceeded 8 per cent of the total. In the course of the twenty years intervening between the two wars, about 93 per cent of the nation's net product (which is equivalent to its income) passed into the hands of the public as consumer goods, while less than 7 per cent was added to the stock of capital goods.[44]

It is clear, then, that the purchasing power of consumers, derived largely from wages, provides the prime mover for the economic progress of the whole nation. An untimely breakdown, or even a lag in wage standards in relation to the prevailing price levels and productivity, may precipitate a widespread dislocation of the whole economy. Such a widening disparity between wages on one hand and prices and productivity on the other, took place during the 1920's, contributing heavily to the disastrous depression of the 1930's.

Money wages adjusted for the cost of living are termed real wages. If money wages increase and the cost of living, as measured by consumer prices, increases at the same rate, there is no gain in real earnings: the purchasing power of the wage-earner remains the same. Real wages, or real earnings, are the significant measure of the change in the wage-earner's purchasing power.

Productivity of an industry is measured by the output per man-hour. The man-hour output does not measure the productivity of labor alone; it represents the combined result of what men, management and machines contribute toward production. Technological advancement is often a controlling factor in productivity.

Labor, management and leading public spokesmen are

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[44] See *Annual Report of the Director of Research*, by Arthur J. Burns, National Bureau of Economic Research, Inc., 1947. See also *Statement of the American Federation of Labor to the Council of Economic Advisors*, March 14, 1947.

today agreed that improved productivity is indispensable for the attainment of greater production, wider and fuller employment and larger income for the nation. There is also general agreement that in order to maintain maximum employment, it is necessary for workers to have a fair share in the returns yielded by increased productivity through higher earnings and for consumers to have a fair share in such returns through lower prices. If the gains of increased productivity are not passed on in these forms, purchasing power of consumers is no longer in balance with increased production and the market for the increased volume of production disappears.

This generally is what happened in 1920's. The first World War had given an enormous impetus to technological advances. Armed with new technology, the American industry, following the short depression of the immediate postwar years, embarked upon a great expansion of its production. The value of industrial product expanded year after year, but real earnings lagged far behind.

The key to what happened to the level of earnings will be found in the record of union history of those years. In the key steel industry, the union was destroyed as the result of the employers' insistence upon the open shop, which precipitated—and eventually broke—the strike of 1919. The open shop drive also swept away union gains in meatpacking and in other major industries in which unionization became extensive during the war. In coal the campaign against the union shop was accompanied by general repudiation of wage standards by employers. Wage competition reached cutthroat proportions in many occupations. Wages, and with them real earnings of workers, were falling far behind the advances in industrial productivity.

This development is forcefully brought out by the following comparison between real earnings and man-hour output in the decade between 1919 and 1929:

PERCENT CHANGE IN REAL WEEKLY EARNINGS OF WORKERS AND OUTPUT PER MAN-HOUR, 1919-1929

Industrial Group	Real weekly earnings (Percent change)	Output per manhour (Percent change)
Manufacturing	+ 21	+ 73
Bituminous Coal	— 9	+ 26
Railroads	+ 19	+ 33

Source: Weekly earnings and productivity data of Bureau of Labor Statistics, U. S. Department of Labor.

A comparison covering a part of the same period, from 1923 to 1929, further emphasizes this failure of real wages to keep up with increased output:

PERCENT CHANGE IN REAL WEEKLY EARNINGS OF WORKERS AND OUTPUT PER MAN-HOUR, 1923-1929

Industrial Group	Real weekly earnings. (Percent change)	Output per manhour (Percent change)
Manufacturing	+ 8	+ 32
Bituminous Coal	— 20	+ 8
Railroads	+ 8	+ 18

Source: Weekly earnings and productivity data of Bureau of Labor Statistics, U. S. Department of Labor.

It will be noted that between 1923 and 1929 productivity in manufacturing increased four times as fast as weekly earnings of workers. In coal, an 8 per cent increase in productivity was accompanied by 20 per cent reduction in earnings. In railroads, productivity rose more than twice as fast as earnings. In all industrial groups output was far outrunning earnings. The seeds of the great depression were being sown.

The anti-union open shop drive of 1920's reduced the trade union membership to half its wartime strength. Even where union organization managed to survive, closed shop agreements gave way to open shop clauses, collective bargaining strength of unions was greatly diminished and inequality between workers and employers enhanced. This

breakdown in union security achieved through the employer drive against the closed shop was a major factor in the ensuing disparity between the level of productivity and workers' earnings. In the depression years which followed, employers, workers and all citizens paid dearly in bankruptcy, unemployment and economic distress for the consequences of preventing unions, through collective agreement, to help maintain balance between purchasing power and production.

America is facing another test of a postwar era. Again it will be an economic test of the nation's ability to maintain buying power sufficient to support expanding production, once more accelerated by great technological advances born of war. Again a concerted drive against the closed shop and union security is underway. If American statesmanship fails to discern the far-reaching significance of the events which took place a generation ago and permits the emasculation of collective bargaining, our nation cannot escape the inevitable repetition of the consequences to the nation's welfare which must follow in the wake of the destruction of organizational security of its workers.

IV. THE CLOSED SHOP AND INDUSTRIAL PEACE

In Part III we have indicated how vital is the contribution of union security to the economic welfare of the nation. We shall now consider the positive role of the closed shop and other types of union security in assuring industrial peace in general and specific areas of labor-management relations.

A. The Protective Functions of the Closed Shop

Opponents of the closed shop, the union shop and related forms of union security almost invariably disavow any antagonism toward unions or collective bargaining. Quite

the contrary, they claim: they are for collective bargaining and for unions. They are opposed to the closed shop, they assert, because if membership in a union were not made a condition of employment, collective bargaining and labor-management relations would improve.

Such assertions are not only disingenuous but fly in the face of the simple fact that the most lasting and most peaceful labor-management relations have been established under closed shop conditions. They also ignore the evidence showing that in overwhelming preponderance collective bargaining agreements contain as a basic provision the union security clause making union membership a condition of employment. As we have shown (see Part II), over 75 per cent of workers covered by all collective bargaining agreements, and over 85 per cent of workers covered by agreements in manufacturing, are under such union security clauses.

Repudiation of the union shop, moreover, is, in effect, rejection of the principle of collective bargaining itself. To be in favor of self-organization for mutual aid and protection and at the same time against the closed shop, is a contradiction of terms. As Samuel Gompers said, "it is absurd to consent to or give assent to the organization of labor and deny the logical result—the union shop."[45] The greater the proportion of workers mutually agreeing to pursue a common objective, the more effective is their organization formed to achieve that objective. Hence, to attain a condition in which all employees in a given situation are bound together in the same organization for the protection of their mutual interests, as is accomplished only under the union shop, is to attain the very perfection of the principle of self-organization. It is untenable to affirm the

[45] Samuel Gompers, in *The American Federationist*, Vol. XXII, P. 221.

principle and, at the same time, deny the right to make that principle most effective.

The union shop first developed as a defensive device of workers, rooted in the most fundamental of human laws—that of self-preservation. The continuing importance of the protective function of the union shop is emphasized by the following consideration of the most important aspects of this function.

1. *The Closed or Union Shop Protects Wages and Employment Standards of Workers*

It is the employers' drive toward lower wages and their resulting opposition to unions and resistance to genuine collective bargaining that make union security clauses necessary. Had there been full and enduring acceptance by employers of collective bargaining and of the union as the desirable instrumentality, essential to orderly negotiation and to industrial peace, the need for union security would no longer be insistent.[46] But the realities of industrial relations as they exist today, make it plain that such complete and lasting acceptance of unions by employers is the exception rather than the rule.

A president of a hundred-million-dollar corporation aptly describes what lies behind this attitude prevailing among most employers, when he says:

"When an average group of executives sits down to consider a new operating budget, they usually say this of their

[46] In a number of areas of industrial employment, notably in building and construction trades, there are examples of labor-management relations based on *verbal* understandings between the union and the employer, with verbal agreement backed by long-established practice and custom and the employer acceptance of the principle of union security. (*Note:* Workers covered by verbal agreements based on employer acceptance of union security are *not* included in the figures cited in Part II showing the extent of union security clauses.)

advertising program: 'How much money, in view of the company's needs and prospects, could we spend on advertising in 1947?' But when that same group meets to consider the problem of wages, the attitude is something like this: 'How little can we pay our employees and still avoid a strike?' "[47]

It is admittedly the ever-present drive for the lowest pay the worker will bear that prompts the employer to strive for individual bargaining in preference to collective bargaining and to oppose the union as the instrument whereby workers protect their pay standard. So long as this attitude prevails, union security, maintained by contractual agreement, is essential to the maintenance of an equitable collective bargaining process and to the survival of the union itself. This point is well summed up by Professor F. T. Carlton:

> "The economic necessity for the closed shop depends in a large measure upon the attitude of the employer. If the employer insists upon his right to make individual bargains with non-union employees, and discriminates against union men, or hires non-union men at a lower wage than that paid union men, the union will sooner or later be obliged to fight or be disintegrated. The hostile employer, unless restrained by the closed shop or by a uniform system of wage payment for all workers coupled with a system of apprenticeship and of promotion, can deunionize his shop unless the union includes practically all the workers available in that trade or industry. The union facing a hostile employer anxious to reduce wages and to lengthen the working day, and in touch with a supply of non-union workers, is forced, unless it gives up all hope of efficient trade-union action, to adopt the closed shop policy. Under such conditions the closed shop means more bread and

[47] "Labor Relations on a Hard-Boiled Basis" by Charles Luckman (President, Lever Brothers Co.), *Harper's Magazine*, June, 1947, p. 513.

butter, more leisure, and better treatment for the wage earner."[48]

Strong competition exists among workers to sell their services in order to gain a livelihood. This competition is intensified by the employers' willingness to take advantage of an often over-abundant labor supply. Those employers who would prefer not to exploit workers are often forced to do so to meet the competition of other, less scrupulous, employers. The result is a vicious downward spiral of cut-throat wage competition, leading to a complete breakdown of standards. The only weapon against such destructive wage competition open to the workers is self-organization. And the only way workers can make that weapon effective in a particular plant or area, is to extend that organization to as many workers as possible, so that all employees will mutually agree to work for certain standards only. This can fully and effectively be achieved only under the union shop. Only through the union shop can union workers combat the competition of non-union workers willing to work for less than the established wage, to the detriment of the majority.

While it is the privilege of any worker to work for sub-standard or even starvation wages if he wishes, he has no right to impose the consequences of this privilege on his fellow workers. Unionists who, through many sacrifices, have achieved certain minimum standards, vital not only to them but to the welfare of the whole community, have a morally greater right to seek to protect such standards against destruction. The union shop is the only way for the unionists to make sure that their standards of wages, hours, employment conditions and working rules are effectively protected.

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[48] *The History and Problems of Organized Labor*, by Frank Tracy Carlton, Revised Edition, pp. 139-140.

2. *The Closed or Union Shop Provides Necessary Protection to the Workers' Right of Self-Organization*

Competition of non-union workers willing to work for a substandard wage constitutes more than a threat to the established wages and working conditions: it threatens the workers' livelihood itself. Where for economic reasons the employer chooses to hire lower-paid non-union men in preference to union members, the unionists are deprived of their jobs and the union is soon destroyed. The inevitability of this result, in the absence of a closed or union shop, was officially recognized in the report of the first U.S. Industrial Commission, created by Congress to report on industrial relations. The Commission's report, rendered in 1902, expressly defended the closed shop and arrived at the conclusion that *the logical result of the non-closed shop was the destruction of the union.*[49]

The report of the second United States Commission on Industrial Relations, made in 1915, stated as follows:

> "We are • • • of the opinion that where an employer enters into an agreement with a union which stipulates that only union men shall be employed, *a thing which he has both a moral and legal right to do*; the non-union worker, in that event, can have no more reason to find fault with the employer in declining to employ him than a certain manufacturer would have if the employer, for reasons satisfactory to himself, should confine his purchase to the product of some other manufacturer."[50]

Discharge or other discrimination against any worker found to be a member of a labor organization, has long been a widely-used device of employers opposing attempts at

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[49] *Final Report of the Industrial Commission*, H. Docket, No. 380, 57th Congress, 1st Sess., 1902, Vol. XIX, pp. 815-817.

[50] *Final Report of the United States Commission on Industrial Relations* (1915), pp. 427-428. Emphasis added.

self-organization. This device was effectively used both in the initial stages of union organization and after the union has been formed and a contract entered into. If the employer's discriminatory actions were not successful in thwarting union organization in the beginning, he often succeeded in undermining the union even after a contract had been entered into by discharging those active in the union's affairs.[51] A union shop agreement which precludes such discharges is the only effective voluntary means of defense against such attempt to undermine union organization by unfair discrimination.

The union shop is necessary and justified on the principle of protection alone. The late Clarence Darrow regarded the acceptance of this principle as being of compelling importance, stating:

> "The closed shops are the only sure protection for the trade agreements and for the defense of the individual * * * The closed shop is the only means that experience has shown to be essential to protect the liberty workingmen have already won."[52]

Professor Lionel Edie, in his appraisal of the place the closed shop should properly occupy in our industrial life, stresses the basic necessity of the closed shop as an instrument of protection. Professor Edie states his view in the light of the judgment of Mr. Justice Frankfurter, expressed after his service as chairman of the National War Labor Policies Board in the First World War:

> "Labor resorts to the closed shop in response to the basic human desires for self-protection, because the

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[51] See testimony of William Green, President, American Federation of Labor, on the Wagner Labor Relations Bill (S. 1958), March 14, 1935, *Hearings Before the Committee on Education and Labor*, U. S. Senate, 74th Congress, 1st Session, on S. 1958, Part I, pp. 104 ff.

[52] "Why Men Fight for the Closed Shop," by Clarence Darrow, *American Magazine*, Vol. LXXII, p. 550.

> non-union shop has so often meant in actual practice a free opportunity for employers to discriminate against union members and to cripple union organization. * * * The penetrating observations of Felix Frankfurter, from experience on President Wilson's mediation commission and as chairman of the National War Labor Policies Board, are of sound practical value: 'The unions must still fight for their life instead of being a recognized social instrument tested by their contribution to the community as a whole. Not until they are generously and frankly recognized as having a rightful place in our national life will the leaders of labor have time and energy to give to the solution of the difficult social and industrial problems with which organized labor should concern itself. . . . If the fighting spirit imposed by capital upon labor were withdrawn, then we could proceed to the question which this conference raises, namely: How shall we release the energies of the masses of the people who are workers so that our civilization shall not only remove the sores and injustices which infest it but shall be something fit and adequate for democracy?' * * *"[53]

The necessity for the closed shop is not removed by legal prohibition of discrimination against workers because of union membership. It is a familiar fact that the practice of anti-union discrimination by discharge and demotion had become so flagrant as to require the intervention of Congress. While the passage of the National Labor Relations Act in 1935, prohibiting such discrimination, emphasizes the necessity for statutory protection prior to the Act, it does not detract from the necessity for protection at the present time. The National Labor Relations Act, both in its original form and as amended, does not cover intra-state industries. Proceedings before the National Labor Rela-

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[53] *Economics: Principles and Problems*, by Lionel D. Edie, New York, 1926, pp. 787-8.

tions Board on charges of discrimination are long drawn out. And experience under the Act has taught the employer methods of discrimination both subtle and difficult to prove.[54]

These practical and procedural difficulties greatly reduce the effectiveness of such statutory safeguards against discriminatory practices against the union. They are not a substitute for the effective protection of the closed shop. So that, even where the safeguard of Section 8(3) of the Act is applicable, the present, known and certain security of the union and of the right to self-organization is preferable to the uncertainties, delay and remote prospect of compliance and redress which may eventually be gained by resorting to the National Labor Relations Board.

Nor has discrimination been eliminated in the limited area of coverage of the National Labor Relations Act. When proceedings are instituted under the Act and charges placed with the Board, the very contest between the employer and the employees breeds rancor and antagonism. While such statutory protection is necessary, it is neither as effective as the voluntary institution of the closed shop by agreement between parties, nor capable of assuring harmonious relations on a lasting basis of mutual acceptance which the closed shop affords.

The absence of organizational security breeds trouble, antagonism and unrest. The protection to the union survival which the closed or union shop provides to the workers gives a tested assurance of peaceful labor man-

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[54] According to the Board itself, "In most cases of alleged discriminatory discharge, • • • the employer has insisted that the dismisssals had nothing whatsoever to do with organizational activity, but were for inefficiency, insubordination, infraction of rules, or other legitimate cause." *First Annual Report of the National Labor Relations Board*, 1936, p. 78.

agement relations. Such protection provides a firm foundation for mutual confidence between labor and management, indispensable to positive cooperation between them.

B. The Constructive Contribution of the Closed Shop to Peaceful Labor-Management Relations

1. *Union Security Essential to Stable Labor-Management Relations*

So long as the status of the union is not assured, labor-management relations must of necessity be carried on in an atmosphere of antagonism and strife. Since the matter of union survival is at stake, the union under open shop conditions is likely to devote its energies to demonstrating to every worker that his every complaint, no matter how minor, is met, and that the union is capable of intervening on behalf of workers on every problem that may arise. This leaves little room for a concerted policy of developing reasonable standards and sound procedures in adjusting complaints and grievances. The eyes of the union are always turned to the question of finding the best means to enable the union to overcome resistance and to endure. Every move of the management is watched with suspicion and regarded with distrust.

All this undergoes a drastic change, once union security is assured. Under closed shop conditions there is no need for the union to dissipate its energies on warding off every real or imaginary threat to its existence. Certain of its security, the union can look upon the management with confidence and trust. And it is then able to release its energies and resources for the constructive task of union-management cooperation and realization that better stand-

ards of work and pay go hand in hand with high standards of worker performance.

Professor Sumner Slichter's study of the closed shop reaches the following conclusion:

> "In the minds of American employers the expression 'closed shop' has been a symbol of union domination. This is a mistake. An assured status for the union is not a guarantee of successful union-employer relations but it is a prerequisite, and the closed shop or its equivalent is one way of assuring the status of the union." [55]

Professor Slichter backs up this conclusion with these findings:

> "The employer is likely to have more freedom in shops where the status of the union is established than in one where its position is more or less precarious. Where the union is not secure, it is compelled to attempt to resist the employer's discretion at every point where he may discriminate against union members in favor of non-members. In particular, as pointed out earlier in this chapter, the union must endeavor to restrict his control of layoffs. The union virtually has no choice but to treat the control of layoffs as a major issue. Where the closed shop exists, however, the union has less at stake in many decisions of management. Hence it is not in a position to insist upon controlling these decisions. This is why more managerial discretion may be permitted in a closed shop than in an open one." [56]

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[55] *Union Policies and Industrial Management*, by Sumner H. Slichter, The Brookings Institution, Washington, D. C., 1941, p. 95.

[56] *Ibid.*, p. 95.

The value of the closed shop in this respect is forcefully summed up by Dr. Jerome Toner in his thoughtful and exhaustive study:

> "Cooperation . . . between the union and the employer which is productive of the greatest possible product and the most equitable and just distribution generally obtains only when a closed shop exists. Unionists and unions alike feel a sort of co-partnership relation because the closed shop signifies complete victory in the struggle for recognition and existence of the union. It gives the employees the sense of ownership which creates interest and responsibility conducive to greater production and efficiency. It frees the energies and resources of the union for activity tending to stabilize and equalize labor costs.
>
> "But even while it increases the strength of the unions—numerically and financially—it tempers the animosity that all too frequently characterizes the meetings of management and labor. In many instances it introduces the atmosphere of a clean fight, with a fair exchange of give and take. The union can afford to lose without a feeling of desperation that its life depends on the outcome of a specific situation.
>
> "Moreover, it gives the union leaders an opportunity to gain an insight into the structure of the industry and the problems of the individual employer. It creates that spirit of cooperation which logically leads to harmonious and efficient relationships . . ."[57]

This is equally true of the union attitude toward maintaining continuity of uninterrupted production. While a strike imposes the greatest hardship upon the workers involved, and unions under no condition would resort to

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[57] *The Closed Shop* by Rev. Jerome L. Toner, Ph.D., American Council on Public Affairs, Washington, 1942; p. 167.

strike unless the correction of a deep-seated injustice, or redress of a real grievance was at stake, a union which lacks security may from time to time be prompted to threaten strike action merely to test the loyalty of workers or to demonstrate its strength to them.

In contrast, a closed shop union has no need to resort to such tactics. Having gained the security of its organization, the closed shop union is loath to jeopardize it, as it would once the union became involved in a strike. For such a union, uninterrupted earnings of its members and uninterrupted production making such earnings possible is at a premium. Except in an insuperable conflict over a critical issue, a closed shop union will always choose peace in preference to strife as its instrument of union policy.

There is ample confirmation of this conclusion in the record of labor disputes and work stoppages. The largest areas of many years of uninterrupted peaceful relations are found in apparel manufacturing, in printing trades, in stove manufacturing, in glass bottle manufacturing, in electric contracting and in many other sections of industry, all of them covered by closed shop agreements.

In an investigation of the closed shop made just before the war, the National Industrial Conference Board, an employers' organization found that *employers* with practical experience under it affirm that the closed shop "places the union in a better position to keep its agreement; eliminates coercion of employees; gives the employer the help of the international union officers, if necessary; gives employees greater feeling of responsibility and interest in their jobs because they feel they have something to say about their conditions of work; make it possible to hold the union responsible for the actions of its members, while with the open shop it cannot be held responsible." The NICB re-

port sets forth the following statement by the president of a large company as concrete evidence that the contribution of the closed shop to sound labor relations and industrial peace is rooted in the realities of practical management experience.

> "There is little doubt that a closed shop reduces or eliminates strained relations among groups of employees, intraplant hatred and strife, which are very detrimental to management and earnings. It also avoids invasion by other union groups or competition between different unions within the same plant. Centralized responsible leadership in a national and experienced union has resulted in improved discipline, higher efficiency, and spirit of cooperation. The union undoubtedly appreciates receiving the closed shop and has encouraged a spirit of interest in the success of our business. The union is able to insure uninterrupted operation—our contract calls for no strikes—and it can handle men who would otherwise be chronic troublemakers. Collective bargaining is more orderly since we are dealing with only one group, with which we can deal at arm's length. We feel and we believe that many of our thinking workers feel that the closed shop is the best workable solution in the present situation * * * Under present conditions we would not want to go back to the constant strife and bickering incident to the open shop. We have not been arbitrarily dealt with since we agreed to the closed shop."[58]

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[58] National Industrial Conference Board, Studies in Personnel Policy, No. 12, March, 1939, "The Closed Shop," p. 6.

A similar view was recently expressed by a head of a large Chicago firm, Herbert J. Buchsbaum, President of S. Buchsbaum & Co.:

> "The effect on workers of a closed shop is an immediate improvement in morale. They at once recognize that management has wholeheartedly accepted them as a partner and no longer plots the destruction of their union.
>
> "Responsibility is definitely fixed on and assumed by the union for discipline, full production, effective cooperation with management directives. The workers realize that their fight against management for union security is over, that their future well-being rests entirely on their ability to make the new partnership operate very smoothly and steadily.
>
> "The effect on *management* of a closed shop is even more pronounced. Where labor has security, management has it also. Freedom from petty bickering, suspicion, harassment and friction is sweet music to management. Certainty of good will and steady production by labor enables management boldly to proceed with acquisition of raw materials, manufacturing space, and advertising campaigns. Peace of mind replaces worry.
>
> "The effect on *business* of a closed shop can best be judged by the showing of businesses in which the closed shop prevails. Labor harmony should produce a wealth of suggestions for improvements in methods. The labor-management committee struggles with production problems rather than with each other. The high morale fostered by mutual trust will show a corresponding profit for the company."[59]

At the point at which industrial relations in this country stand today, the choice between the closed shop and the open shop is the choice between smooth, constructive and

[59] "Should the Closed Shop Be Outlawed?" by Herbert J. Buchsbaum, *Modern Industry*, Vol. 13, No. 2, February 15, 1947, p. 112. For full statement, see Appendix

cooperative labor-management relations which the closed shop creates, and the constant squabbling and fighting with the resulting deep-seated conflicts which are bound to arise under the open shop. This is emphatically confirmed by Patrick McDonough, an Oakland, California manufacturer who has established and long maintained a closed shop relationship with his employees:

> "One of the basic principles in my business career is to get along with the people who work for me and the union that represents them. To me, it seems the height of bad business to be involved in continual petty squabbles with labor and to waste my time and energy trying to get rid of the union. You can never get cooperation, efficiency or high production that way.
>
> "We are a great country because of our great production. Our high standards of living can be attributed to the unions who have made possible a fairer distribution of this high production.
>
> "I have discovered that it is good, hard business sense to treat my employees right. I have learned that when I pay a fair and decent wage I get a good day's work. I have been convinced that when I recognize the union representing my workers and I agree to give it security through a closed shop contract, I get the men to work with me, instead of against me. That union, by the way, is the International Brotherhood of Boilermakers, A. F. of L.
>
> "Now Congress is proposing to make it illegal for me to sign any future closed shop contracts with the union * * * That isn't going to do me any good and it isn't going to do any good to the thousands of other American employers who believe as I do."[60]

Employers in all parts of the country and from every industry have provided testimony, rooted in their practical

[60] Press statement by Patrick McDonough, Oakland, California, manufacturer, May 27, 1947. (Quoted in A. F. of L. Weekly News Service, Vol. 37, No. 21, May 27, 1947.)

experience, of the effectiveness of the closed shop agreement as a tested instrumentality of lasting industrial peace.

2. *Contribution of the Closed Shop to Industrial Peace Proved by Wide Experience.*

We have shown, relying on the studies made by outstanding students of the problem and on testimony of employers, that the closed shop and related forms of union security eliminate the major sources of distrust, antagonism and friction between workers and employers and bring about lasting harmony in industrial relations. There are numerous examples in industrial experience of transition from conflict and strife to lasting peaceful relations as the result of employer acceptance of the closed shop.

The industry in which the greatest number of workers are covered by closed and union shop provisions is the manufacturing of wearing apparel. According to the Bureau of Labor Statistics, approximately 885,000 of a total of nearly 1,000,000 employees are covered by these types of union security in the entire apparel industry.[a]

That these workers became union members, gained collective bargaining rights and eventually negotiated closed shop agreements, was no easy accomplishment. The major unions in this field, the International Ladies' Garment Workers Union, the United Garment Workers of America and the Amalgamated Clothing Workers of America have achieved these gains only through a series of hard fought struggles.

[a] Bureau of Labor Statistics, U. S. Department of Labor, release of April 27, 1947. According to the B.L.S. study, the proportion of workers under union agreement in clothing, is distributed as follows by type of union security: Women's clothing, 97 percent closed shop or union shop with preferential hiring; 3 percent union shop without preferential hiring. Men's clothing, 90 percent closed shop or union shop with preferential hiring; 6 percent union shop without preferential hiring; 4 percent preferential hiring.

The apparel industry is one of the basic industries of the nation. Under the closed shop, it has established a notable record of industrial peace. There has been no major work stoppage under the industry's closed shop agreements in the past fourteen years. The simple story of how this was achieved is told by David Dubinsky, President of the International Ladies' Garment Workers Union, A. F. of L., in his testimony before the Senate Committee on Labor and Public Welfare:

> "Practically all of the 380,000 members of the International Ladies' Garment Workers Union are employed today under union shop agreements. It was not always so. From 1900, when our union was first organized, until the year 1910, it was unable to obtain any form of union security in its labor agreements. As a result our union was weak and without influence. The ladies' garment industry gives only irregular—seasonal—employment. When work was plentiful our union would be successful in organizing part of the trade. A few months later, when the slack period would set in, the workers who had joined the union would drop their membership and the union would collapse. Working conditions in the industry were intolerable. Many of the factories were located in tenement houses in slums, and in basements. Work began in the early hours of the morning and continued late into the night. Workers had to pay for electric power, for thread and needles, and had to supply their own sewing machines. There was little or no ventilation in the work room. Health conditions were unsanitary. Tuberculosis was the occupational disease. Employers who made contracts with our union and tried to maintain decent standards in their shops often would find that they could not withstand the competition of the sweatshops. Decency resulted in bankruptcy. The members of the union who worked for decent employers often would lose their jobs and were unable to maintain their organization. When work became plentiful again in the industry, the workers had to resort to

strikes in order to reestablish their union and to improve their conditions of work. The industry, as a consequence, was in constant turmoil. Neither the workers, nor the employers, nor the public benefited by this state of affairs.

"By 1910, work conditions in the coat and suit industry in New [redacted] had become so intolerable and inhuman that [redacted] cloakmakers revolted and went out on strike. Only a minority were members of our union. All the workers, however, flocked to our union in droves. What crime did we commit when we tried to lift these masses of underprivileged workers out of industrial slavery and make self-respecting, useful citizens out of them?

"The employers fought the strike bitterly with every weapon at their command. They employed strike-breakers, labor spies, private detectives and obtained injunctions. The public was aroused. Influential citizens attempted to persuade the employers to come to terms with the union. But the employers were adamant.

"After many weeks, that strike of 1910 was settled by mediation though the good offices of the late Justice Louis D. Brandeis, then a well known Boston lawyer. The employers finally offered a reduction of the work week to 54 hours, increases in wages and improvements in sanitary conditions. But the workers knew that these gains would soon vanish into thin air unless their union received recognition through the closed shop. The employers, however, were unyielding on this point. Brandeis proposed the 'preferential union' shop as a compromise. This meant that in hiring new workers, preference must be given to a member of the union if he was equal in efficiency to a non-union applicant for the job. After much controversy on this point, the union and the employers accepted the Brandeis compromise and the famous 'Protocol of Peace' was signed.

"But subsequent experience proved the preferential union to be unworkable. The union workers resented the presence of non-union workers in the shops and re-

fused to work with them, regarding them as second-class citizens. Complaints without number developed each day within the shops because the union workers demanded preferential treatment which they did not receive. The arbitration machinery, which was one of the novel features of the 'Protocol of Peace' was bogged down by countless complaints which were submitted to it as a result of this condition. The employers found that this double standard interfered seriously with the conduct of their business.

"The principle of the 'preferential union' shop was abandoned in 1915 in favor of the union shop which even the employers preferred. Ever since then the union shop has prevailed in the industry and is provided for in practically all of the collective agreements our union has made. The union shop contract has enabled our union to make a notable contribution in the industries in which it functions. We have not had a major strike since 1933. So far as the employers in our industries are concerned, they consider the closed or union shop provision a stabilizing influence in employer-employee relations. They agree that it makes for peace in the shop. They recognize that it eliminates disputes among conflicting groups of workers.

". . . . If the legislation now proposed was in existance in 1910, our union would not have grown, and our industry's labor-management relations would have been blighted with strikes and controversies."[62]

Printing and publishing is another basic industry in which peaceful industrial relations have predominated and have been a model for many years. Most of the industry is today, and has been for a number of years under the closed shop. According to the Bureau of Labor Statistics, ap-

[62] Statement of David Dubinsky, President of the International Ladies' Garment Workers Union, A. F. of L., February 25, 1947, as filed with Committee under the Senate rules. See Hearings before the Committee on Labor and Public Welfare, U. S. Senate, 80th Congress, 1st Session, on S. 55 and S. J. Res. 22, Part 3, pp. 1332 ff.

proximately 250,000 workers employed in printing and publishing in 1946 were under the closed shop.

This industry presents not only a notable example of lasting peaceful labor-management relations, but also outstanding instances of industry-wide union-management cooperation to improve productivity and increase efficiency. The International Printing Pressmen and Assistants' Union, A. F. of L., for example maintains a nationwide technical engineering service available to union shop employers. The technical staff of the union analyzes employers' products and processes used and advises on the latest technological developments. Union-management cooperation for improved production is in this, as in many other instances, a direct outgrowth of the employer acceptance of union security.

The effect of the closed shop on industrial relations in another branch of the printing industry is described in a statement recently made before a Senate committee by Matthew Woll, vice-president of the American Federation of Labor and vice-president of the International Photo Engravers' Union:

> "Practically 95 percent, perhaps slightly more, of all workers employed at photoengraving and photogravure throughout the Dominion of Canada and the United States are affiliated with the International Photo Engravers' Union. In parlance of those unfriendly to organized labor, our organization might be considered monopolistic in character, yet in all of our 45 years of existence none of the evils generally attributed to monopolistic combinations have been manifested. On the contrary, the industry in which our members are employed never heretofore enjoyed a more peaceful and cooperative relationship. Those patronizing the industry have profited as well. • • •
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> "The organization I represent • • • has progressed admirably and with comparatively little conflict with

employers. From one of the lowest paid branches of industrial workers, photoengravers today rank highest in annual earnings among industrial workers and are in the forefront in the reduction in working time. These accomplishments have not been attained at the loss of employers or to the detriment of the buying public; rather, they have come largely by improvements in production, production methods, increased skill, and improved facilities.

"In the newspaper branch of our industry, I do not at present recall more than a half-dozen strikes having taken place during the entire period of our organization—indeed, our relationship in this branch of our work has been without a peer. In our commercial shops we encountered considerable difficulties time and again while in state of disorganization.

"Within the past 20 years or so we have been comparatively free of serious industrial strife. Only once did we encounter a national conflict with our employers and which was in the nature of a lock-out on the part of our employers in an attempt to have our members return to a 48-hour week after having agreed to a 44-hour workweek in the previous year. During the past ten years I do not recall but one or two inconsequential strikes having taken place in our craft. • • •

"One of the terms of employment embraced in practically all of our agreements is what is generally termed a 'closed shop' provision. We do require in all our contracts that employers engage only members in good standing of the union, and that if we are unable to supply the necessary manpower to meet the trade requirements, the employer is free to seek help elsewhere until such time as we may be able to furnish the necessary help. This provision has operated most satisfactorily. Time and again employers have engaged help outside of the union and, if proved competent by training, skill and experience for journeymen membership in our organization and the employer has seen fit to pay such workers the established scale of wages, we have had no difficulty in securing their affiliation. In no instance in the last ten or fifteen years do I recall any pressure

having been applied to influence such a worker to join the union."[63]

Still another example of a major industry with the vast majority of workers under closed shop agreements is building and construction. Approximately 1,500,000 building and construction mechanics and laborers throughout the nation are employed under union agreements. About 94 percent of these workers are under closed shop agreements and about 6 percent under preferential shop contracts.[64]

During the past 20 years building strikes have been rare. There are many building contractors who have not experienced a single work stoppage over a period of years. The United States Housing Authority (which aids projects developed by local authorities and built by private contractors) entered into a voluntary non-strike agreement with the building and construction unions in 1938. This no-strike agreement has been carried out inviolate in the construction of all USHA-aided projects built in all parts of the country since that time.

The no-strike pledge made by building trades unions with respect to defense construction preceded such wartime agreements in other industries and trades by more than a year and was carried through the war with a record of being 99.9 per cent effective throughout the five and a half year period.

In a number of branches of building and construction trades the unions developed positive programs of cooperation with employers in the recruitment of labor, in the train-

[63] Statement of Matthew Woll, Vice President, American Federation of Labor and Vice President, International Photo Engravers' Union, Hearings Before the Committee on Labor and Public Welfare, U. S. Senate, 80th Congress, 1st Session, on S. 55 and S.J. Res. 22, Part 3, pp. 1346, 1351-52 (February 25, 1947).

[64] Bureau of Labor Statistics, U. S. Department of Labor, Release of April 27, 1947, Table 5, p. 9.

ing of apprentices and in dealing effectively and efficiently with problems of employment, production and performance. But let a representative employer spokesman, from a key branch of construction, state why the closed shop is essential to stable industrial relations in the industry:

"For almost 30 years, my organization, the National Electrical Contractors Association, has cooperated with the International Brotherhood of Electrical Workers of the A. F. of L. In the pulsating economic readjustments that followed World War I—very much similar to those of today—far-sighted men in the electrical contracting industry—both employer and employee—looked upon the chaotic conditions of the time. These practical men forged an instrument out of their hard experience in industry—experience that had taught them that strikes were not the way to settle labor disputes. This instrumentality was the Council on Industrial Relations for the Electrical Contracting Industry. It was and it is today a system of voluntary arbitration, functioning under the mandate of collective bargaining agreements, as a court of justice for employer and employee alike.

"Where for the past 27 years the Council procedure has been followed, there has not been a strike or work disruption and its existence has made for a condition in the industry that has prevented any major or industry-wide work disruption.

"In other words, we have lived in peace and developed and prospered. The high state of modern electrical installation development attests to the public benefit of this fortunate evolution.

"The foundation of this program is responsibility on the part of both parties—the employer and employee. You cannot expect to have a responsible union unless you give it the means of achieving responsibility. That is, the union must have a measure of security.

"The closed shop contract in effect between labor and management in our industry assures the union of security and gives it a guarantee that the employer is

not interested in fighting the union. Thus the union can concentrate on helping improve production—the only road to greater benefits for labor, management and the public alike.

"We, therefore, protest and oppose any attempt at government interference with our right to deal intelligently and cooperatively with workers and their unions that have demonstrated down through the years a praiseworthy sense of responsibility, foresight in the public interest, high standards of workmanship and an over-all fairness in their relations with us.

"If labor legislation is needed, it certainly is not in the direction of upsetting stability achieved by citizens who, by careful thought, hard work and heroic persistence, carved out a workable industrial relationship without the help of—and, indeed, sometimes in spite of—governmental interference.

"As employers we feel, too, that legislation outlawing the closed shop impairs the employer's right of contract. If an employer prefers to deal only with a group of men who have sold him their worth and responsibility, should he not be permitted to do so? To ban the closed shop is merely to restrict further the employer's right to bargain and to contract with persons of his own choice.

"A law banning the closed shop in our industry might have just the opposite of the effect desired by the sponsors of the anti-closed shop legislation."[65]

We have reviewed specific examples of evidence of the contribution made to stable, peaceful and mature industrial relations by the maintenance of closed shop conditions. These examples can be multiplied. They are sufficient, however, to prove that under highly diverse industrial conditions, stable and sound labor-management relations have been built squarely upon the firm foundation of the closed

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[65] Statement of Robert W. McChesney, President, National Electrical Contractors Association, on the Taft-Hartley Bill, May 27, 1947.

shop. Outlawing of the closed shop will destroy this foundation and, with it, will scrap the procedures governing extremely complex and explosive human relations built up by private agreement over many years.

This is well summed up by Rev. Dr. Toner, who says:

> "In conclusion, it may be observed that, institutionally, the closed shop represents the acme of unionization through which the most effective type of collective bargaining is possible. It is the bond of industrial relations by which men and masters may be united to work together in peace and harmony for their mutual benefit. Non-closed shop relations breed suspicion in proportion to the degree of non-organization; inevitably, the union is wary of the employer and unionists war with non-union employees. Even though the closed shop is no panacea for all industrial difficulties, it does constitute the solution for many of them."[66]

(3) *The Closed Shop Fosters Union Responsibility*

When the union acts as a representative of employees for the purpose of dealing with their employer, it assumes a responsibility for embodying the agreed procedures and agreed terms of employment into a contract. This contractual agreement which the union makes with the employer on behalf of the employees, when concluded, becomes the instrument governing labor management relations. The ability of the union to represent truly and effectively all of the employees concerned, gives such an agreement validity and meaning. Unless the union has in its membership all of the employees on whose behalf it bargains and deals with the employer, it has no way of enforcing full compliance of all employees with the terms of the agreement the union has underwritten.

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[66] Toner, *op. cit.*, p. 191.

When a union enters into an agreement with the employer, it assumes contractual obligations toward the employer. It also assumes duties toward the employees. The contract calls for performance by the employees, effected through the instrumentality of the union. The duties the agreement thus imposes upon the employees carry with them corresponding responsibilities of these employees toward the union. These responsibilities include specific performance of the terms of the contract by the individual employees and their compliance with the agreed procedures specified in the contract.

Under the union agreement, the union acts as the agent of all employees covered by its terms. How can the union be held accountable for the acts of individual employees, or groups of employees covered by the agreement, if such individuals or groups are not even members of the union, do not participate in its meetings and remain beyond the reach of union discipline? Experience has shown, as the testimony of representatives of both labor and management amply demonstrates, that when a portion of employees remains outside union membership and beyond its reach, discipline breaks down, wildcat strikes occur and the peace and stability of labor-management relations is gravely threatened.[67]

Furthermore, the duties imposed by the agreement upon the employees and the benefits the employees derive from the agreement, carry with them corresponding responsibilities of such employees toward the union. The union is the agent and the instrumentality of the employees—not just *some* employees, but *all* employees covered by the union agreement and benefiting from that agreement.

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[67] For statement of reasons why unions must have disciplinary power over each employee involved, see *American Federationist*, Vol. XXIX (1922), p. 385; *Ibid.*, Vol. XII (1905), p. 219.

As an institution, the union must incur expenses in rendering its services. Its officers must be maintained; it must have quarters and provide means of communication with employees, with the employer and with the public. It is necessary for the unions to keep its own records and to have access to information with regard to changing conditions in related employment or similar establishments. In order to provide the most effective benefits to the employees it represents and to make its negotiations responsive to the problems faced by the management, the union has to conduct studies and engage in research. It must concern itself with the standards of pay and work maintained elsewhere in the industry and trade and with activities of other organizations to sustain such standards. And it may find it necessary to deal, on behalf of the workers it represents, in such civic matters related to their employment as health, housing and the welfare of their community.

All of these services are rendered by most unions. All unions render most of them. Every employee under the union agreement, whether member or non-member, benefits from such services. And all employees have an obligation to sustain them.

As stated by Samuel Gompers, "Like all others in society, persons who are desirous of becoming beneficiaries of an agreement should bear the equal responsibility which such an agreement involved."[68] As Gompers pointed out on another occasion, a nonunionist in the midst of a fight for the betterment of working conditions has "no moral right to withhold his assistance in such a fight for bare justice."[69] In the words of Clarence Darrow, union men

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[68] "Talks on Labor" by Samuel Gompers, *American Federationist*, Vol. XII (1905), p. 231.

[69] *Labor and the Employers*, by Samuel Gompers, New York, 1920, p. 112.

"refuse to work with those whose weakness or stupidity make them unfaithful to their class." [70]

The principle that "he who is benefited should bear his share of the expenses of the benefactors" [71] is fundamental to unionists. The principle is based not on sentiment but on justice. As pointed out by Professor Robert R. R. Brooks, the motive behind the union insistence on the closed shop is "the desire to prevent a minority of non-union 'chiselers' from securing, free of charge, the advantages for which union members have paid." [72]

But labor's insistence is not merely on financial contributions from the would-be "free riders." The union properly insists also on moral support and active cooperation as evidenced by union membership of everyone in the shop which the union represents.

As Rev. Dr. Toner sums up the issue:

> "Closely related to this aspect of the closed shop is its function in contributing to an increase in responsibility. Since under collective bargaining the wages, hours, and conditions of work are negotiated and agreed upon by the employer and the union, and since the enforcement of agreements is generally left to the union, it is essential that the union have authority over all the employees to whom the contract applies." [73]

And as Dr. Toner concludes, after a searching study of all available evidence:

> "The closed shop provides the greatest possible opportunity for co-operation because it at least nominally unites the workers of a craft or industry

[70] "Why Men Fight for the Closed Shop," by Clarence Darrow, *American Magazine*, Vol. LXXII (1911), p. 551.
[71] "Causes of the Open Shop Policy," by John R. Commons, in *The Making of America*, Vol. VIII (1905), p. 212.
[72] *Unions of Their Own Choosing*, by Robert R. R. Brooks, p. 156.
[73] Toner, *op. cit.*, p. 157.

in one organized and independent body to which the employer has granted the fullest possible recognition. The unity of employees is essential to the most efficient operation of any shop or industry. The more dependent one employee is upon another, the greater is the need for unity and harmony. Once organization has begun, it is naturally impossible to get complete unity outside of a closed shop contract. No matter how small the minority of non-union employees may be, their very presence is a source of dissension and conflict. If the non-unionists happen to be in a key position, where the highest degree of co-operation is required, the possible cost of the non-closed shop conflict may be easily calculated." [74]

V. THE UNION SHOP AND THE RAILROAD INDUSTRY

It is sometimes argued that because the union shop does not exist in the railroad industry, and because satisfactory labor relations prevail in that industry, the union shop is neither necessary nor desirable in other industries. A claim is also made that the Railway Labor Act prohibits the union shop on the railroads and that the union shop should therefore be prohibited to workers employed in other industries.

The proponents of these arguments misstate the facts, brush aside the entire history of unionization and labor-management relations in the railroad industry, ignore the many economic and legal considerations applicable solely to the railroad industry, and close their eyes to the developments of recent years which demonstrate that, despite special conditions, the extension of union security to the self-organization of railroad employees has become increasingly necessary and pressing.

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[74] Toner, *op. cit.*, p. 166.

The evidence we shall present disproves these arguments by showing:

1. that the provisions of the Railway Labor Act relating to membership in a labor organization (a) were formulated by agreement between the labor organizations concerned and the carriers; (b) were framed at the time when a number of railroads maintained employer-controlled company unions *under closed shop conditions*, effectively barring union members from railroad employment; and (c) grew out of special conditions peculiar to the railroad industry;

2. that the Railway Labor Act contains *no express prohibition of the union shop* such as is contained in Anti-Closed Shop Enactments, but the language of the Act has been interpreted to bar union shop agreements;

3. that while union shop agreements have been thus precluded within the scope of the Act, the Railway Labor Act compels the carriers to engage in collective bargaining, thereby prohibiting by law and under criminal penalties resistance to unionization and collective bargaining and assuring a measure of union security;

4. that in the handling of grievances and of disputes over the interpretation of agreements, national labor organizations are given express statutory recognition and status by the Railway Labor Act and are thereby accorded a greater measure of security than would have been possible without such statutory recognition;

5. that the carriers subject to the Railway Labor Act have demonstrated, over a period of years, their willingness to recognize the status of the unions concerned and to deal with them on all matters of employer-employee relations, obviating the major threat to union security;

6. that in order to secure fair and final adjustment of grievances and equitable settlement of disputes under the

statutory procedure established by the Railway Labor Act, the unions must maintain qualified paid personnel and resort to costly proceedings, including arbitration, with union members bearing the cost of representation and arbitration, while the nonunionists share in the resulting benefits but remain free from tax to defray such costs, with the resulting inequity to and discrimination against union members due to the absence of the union shop; and

7. that the development of recent years, including the appearance of rival and raiding unions, have forcefully demonstrated the need for the union shop, even under the special safeguards and conditions prevailing on the railroads.

The Railroad Labor Board, created by the Transportation Act of 1920,[75] soon proved incapable of coping with both the wage settlement and the industrial relations problems in the industry. Although the Act had authorized the creation of adjustment boards for the settlement of disputes, these were not formed and the disputes came before the National Board, whose docket was badly overburdened.[76] The shopmen's strike against the Board's

[75] Public No. 153, 66th Congress, 2nd Session, Chapt. 91 (41 Stat. 456).

[76] *Organized Labor* by Harry A. Millis and Royal E. Montgomery, (*The Economics of Labor*, vol. III), New York, 1945, p. 736. According to the authors, "A large number of the disputes should never have come before the Board at all, but should have been disposed of by adjustment boards whose creation was authorized by the Transportation Act. But the unions sought national adjustment boards, while carriers opposed them and sought to have boards established by the carrier and its employees. The result was that little adjustment machinery of this subordinate but important type was established, and this very tardily, and that conference counted for little, arbitration at the hands of the Board for almost everything, and the Board was overburdened. Again, the Board and its decisions were imposed upon the parties immediately interested; *they sought and found ways of avoiding rulings, or frequently ignored them. In this respect some of the companies were grievously at fault. . . . Beyond this there were the open-shop and the shop-committee or -association movements, which caused dissension and aroused suspicion on the part of the unions.*" (Italic ours.)

decision in 1922 and incidents in the behavior of some of its members further contributed to make the Board completely ineffective. As stated by Professors Millis and Montgomery, "Finally, in 1925, conferences began between certain railway executives and union officials with reference to the adoption of the new law. The eventual outcome was a bill enacted into law by Congress, without amendment of any consequence, the Railway Labor Act of 1926. This act was formulated as it was because of the reaction of both carriers and unions against settlement of disputes by rulings of a national board and a desire to emphasize conciliation and collective bargaining instead."[77] Professor Harry D. Wolf also stresses the role of the employers and the unions in drafting the Act when he points out that the replacement of the Railroad Labor Board was accomplished "in 1926, when Congress passed the Railway Labor Act, a measure jointly drawn up and supported in Congress by the carriers and the organizations."[78] The fact is that the Railway Labor Act of 1926[79] was the result of an agreement between railroad employers and railroad unions, and was jointly drafted by them in the light of the then-existing conditions and in consideration of the agreed procedures to be followed within the framework of that law.

The Act contained a mandatory requirement to bargain collectively, stating that "it shall be the duty" of carriers and their employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise * * *", and providing further that "all

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[77] *Ibid.*, p. 787.

[78] "Railroads" by Harry D. Wolf in *How Collective Bargaining Works* (Harry A. Millis, Research Director), The Twentieth-Century Fund, New York, 1942, p. 328.

[79] Public No. 257, 69th Congress, 1st Session, Chapt. 347 (44 Stat. 577)

disputes" between a carrier and its employees "shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized to confer, respectively," by the carrier and its employees interested in the dispute.[80] Since these requirements made some form of proper representation necessary, the law provided that each party was to have representatives of its own choosing, with no interference by either party "over the self-organization or designation of representatives by the other."[81]

In discussing this provision, Professor Wolf correctly states that "its inclusion was prompted by the *mushroom growth of company unions* which followed an unsuccessful shopmen's strike in 1922."[82] Prior to the shopmen's case, the Railroad Labor Board had specifically ruled against interference with the right to organize, against discrimination because of union membership, for the right of workers to have representatives of their own choice and for the majority rule.[83] The rulings of the Board were made, despite the failure of the Transportation Act of 1920 to include these guarantees of the workers' rights. And in the shopmen's case the guarantees previously granted by the Board were nullified by the Board itself.[84] As stated by Professor Wolf, the Board's " 'outlaw resolution,' which declared the strikers no longer employees and suggested formation of new organizations, encouraged company unions on a number of roads. While company unions made some headway with other classes of employees, the shop-

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[80] *Ibid.*, Sec. 2.

[81] *Ibid.*, Paragraph 3.

[82] "Railroads" by Harry D. Wolf, *op. cit.*, p. 329. Italic ours.

[83] Decision 119 (2 R.L.B. 87).

[84] Decision 1267 (3 R.L.B. 767).

men suffered the greatest losses."[85] Between July and October, 1922, sixteen roads, covering nearly a quarter of the total mileage of the country, formed company unions for their shopmen.[86]

The Pennsylvania Railroad, which, along with some other roads, had maintained company unions of its employees for some years, spearheaded the fight against the right of workers in its employ to join independent trade unions.[87] On many roads company unions began to operate under closed shop conditions, requiring membership in "system associations" or employee representation plans as a condition of employment long after the passage of the Railway Labor Act of 1926.[88] Other roads chose to "bargain" with company unions on behalf of their members only, so that only company union members would receive the benefits accorded by management. In his study of the Brotherhood of Railway Clerks, Professor Henig states, for example, that "on roads where company unions prevail, the managements frequently may make liberal concessions as a means of thwarting the growth of the Clerks."[89] The Pullman Company, which formed an Employee Represen-

[85] "Railroads" by Harry D. Wolf, *op cit.*, p. 329. See also *The Railroad Labor Board* by Harry D. Wolf, University of Chicago Press, 1927, p. 239 ff.

[86] *Railway Labor Survey*, Social Science Research Council, New York, 1933, p. 41. See also *Characteristics of Company Unions*, Bulletin No. 634, U. S. Bureau of Labor Statistics, 1935, pp. 20, 200.

[87] *Characteristics of Company Unions*, *op. cit.*, p. 220. See also *Pennsylvania Railroad Company* v. *U. S. Railroad Labor Board et al.*, 261 U. S. 72 (1922).

[88] In the extensive literature on the subject, see especially *The Railroad Labor Board* by Harry D. Wolf, 1927, p. 295 ff.; *Decisions of the Railroad Labor Board*, vol. IV; Decision 1829; *Stenographic Transcript of Hearings Before the Railroad Labor Board*, Docket 404; *Railway Labor Survey*, Social Science Research Council, 1933; *First Annual Report*, National Mediation Board, 1935.

[89] *The Brotherhood of Railway Clerks*, by Harry Henig; Columbia University Press, 1937, p. 188.

tation Plan in 1920, fought for the preservation of the company union and against trade union representation of its employees, in the face of all court decisions and statutory enactments as late as 1935.[90] No wonder that under these conditions railroad unions were in constant fear of being "frozen out" by the direct or indirect compulsion of the company union schemes.[91]

Despite the prohibition of the Railway Labor Act of 1926 against interference of either part over self-organization and the choice of representatives by the other, the Texas and New Orleans R. R. Co., tried to retain full control over the organization of its employees. As stated by Profs. Millis and Montgomery, "By inducement and coercion the Texas and New Orleans R. R. Co. sought to introduce an employee-representation plan and to rid itself of the necessity of dealing with the Brotherhood of Railway Clerks."[92] The order of the Federal District Court enjoining the road from interfering with, influencing, intimidating or coercing the Brotherhood, issued in 1927, was fought by the company through the courts until the right of the union to organization uncoerced by the employer was upheld by the Supreme Court in 1930.[93]

This decision resulted in the dissolution of the company union by the Texas and New Orleans Railroad, but the Pennsylvania Railroad and a number of other major car-

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[90] *The Brotherhood of Sleeping Car Porters*, by Brailsford R. Brazeal, Harper and Brothers, New York, 1946, pp. 88-106; for direct evidence of the policy pursued by the Pullman Company of sharp discrimination against employees belonging to the Brotherhood of Sleeping Car Porters, see *Brotherhood of Sleeping Car Porters* v. *Pullman Co.*, Petition to the Federal Coordinator of Transportation, 1933.

[91] *Labor Problems in American Industry* by C. R. Daugherty, Houghton Mifflin Co., Boston, 1933, p. 792. See also *Labor and The Government*, Twentieth Century Fund, McGraw-Hill Book Co., New York, 1935, chapters 4 and 5; and Toner, *op. cit.*, p. 111.

[92] Millis and Montgomery, *op. cit.*, p. 521.

[93] 281 U. S. 548, 1930.

riers persisted in maintaining their company union schemes. The tone was set by the Pullman Company, which asserted in a public statement issued on July 17, 1930, that its employee representation plan was not in conflict with Section 2 of the Railway Labor Act.[94] Thus, while the *Texas and New Orleans* decision paved the way for the 1934 Amendment of the Act of 1926,[95] it did not serve to disestablish the most aggressive company unions or dispel the fears of trade unions of further company union encroachment upon the workers' rights to self-organization independent of employer domination.

The 1934 Amendment replaced the five-man National Board of Mediation with the present three-man National Mediation Board and established the National Railroad Adjustment Board of 36 members, 18 of whom are designated by labor organizations "national in scope." The amended law forbade the yellow-dog contract and any interference with the right of employees to join, organize or help to organize labor organizations of their choice. It made it unlawful for an employer to use his funds in encouraging any labor organization. Finally, it prohibited carriers from influencing or coercing employees to join or not to join any labor organization. This last provision, while it does not contain an express prohibition of a union shop, has been interpreted to bar union shop agreements.

In the course of the hearings on the bill, the railroad unions did not oppose or protest the proposed language of the amendment.[96] Why did the unions fail to insist on a change in the Amendment which would clearly permit the

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[94] Quoted by Brazeal, *op. cit.*, p. 95.

[95] Public No. 442, 73rd Congress, approved June 21, 1934, 48 Stat. 1185.

[96] Hearings, *A Bill to Amend the Railway Labor Act*, S. 3266, 73rd Congress, 2nd Session, 1934.

union shop? Rev. Dr. Toner, in his study of the closed shop, states: "The answer is to be found in the fear that the anti-union or independent union forces might introduce the closed shop principles into their company unions and thereby freeze out the standard unions."[97] And as he points out further, "It should be remembered that even as late as July 1, 1935, but a year after the new Railway Labor Act went into effect, there were no less than 718 system association contracts, representing 24 per cent of the total number and nearly a third as many as the standard unions held."[98] In other words, the lack of union insistence on the union shop in 1934 was by no means due to the lack of their need or desire to establish union shop conditions. It was due to the continuing presence of extensive company unionism, in the face of which the trade unions preferred to rely on other, though admittedly weaker, safeguards to their union security written into the 1934 Amendment.

These safeguards, though by no means obviating the need for the union shop, did remove much of the threat to union survival, and created conditions in sharp contrast with those prevailing in other industries. As has been pointed out, the 1934 Amendment to the Railway Labor Act makes it the absolute duty of the railroad employers, under criminal penalties, to recognize labor organizations and, in good faith, engage in collective bargaining. At the same time an elaborate machinery of compulsory mediation, with final intervention by the President of the United States, is required to be followed in the event that agreement cannot be reached, and strike action is suspended pending exhaustion of the mediation procedure. Such guarantees

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[97] Toner, *op. cit.*, p. 111.

[98] *Ibid.*

exist in no other industry and in themselves serve to distinguish the railroad industry from all others.[99]

The 1934 Amendment also created the National Railroad Adjustment Board with jurisdiction over controversies arising out of the application and interpretation of existing rules and contracts. This provision, adopted over the opposition of the carriers, added to the stature of standard labor unions, by providing for representation on the board of labor organizations "national in scope" and prescribing the procedure for "national labor organizations" in the choice of their representatives.[100]

Important also, especially in the case of the train service Brotherhoods, as distinguished from the unions of nonoperating railroad workers, is the existence of rigid seniority rules. Strict application of seniority in all layoffs, discharges, promotions and demotions affords a large measure of protection against discrimination. The promise of economic security, which seniority offers, has made union membership especially attractive to workers. This is due to the fact that, although seniority applies to all men in service positions, it is created solely by agreement between the union and the carrier and thus becomes the special privilege and contractual right of the union.[101] In the words of Dr. Toner, "At present, as in the past, disputes concerning seniority are settled between the operators and the union. A nonunion man can thus readily see that his protection depends on the union and that membership in the brotherhood is virtually indispensable to his interests."[102] Such seniority of train service employees differs from the

[99] See *Labor and the Government*, Twentieth Century Fund, Inc., New York, 1935, pp. 87-88, 189-90.

[100] Section 3.

[101] *Ryan* v. *N. Y. Central*, 267 Mich. 202; *Hartley* v. *B. R. & S. C.*, 277 N. W. 885. See also Toner, *op. cit.*, p. 102.

[102] Toner, *op cit.*, p. 102.

seniority of other workers, because, other things being equal, their seniority governs promotions and demotions along a clearly established line of positions *for the entire railroad system or its various divisions*, in contrast with departmental or even plant seniority in industry. An industrial worker loses his seniority completely when his department or plant is abolished. A railroad worker, in train service, would merely be transferred to another train, or branch in case his train or branch of the railroad were eliminated.

As Dr. Toner points out, "This [the seniority] feature of the operating sections of the railroad industry made the strict application of the closed shop principle impractical." [103] But such is not the case with respect to the non-operating railroad personnel. Workers in non-operating railroad occupations do not, as a rule, move up to another distinct class or craft on the basis of their seniority, as does, say, a fireman who becomes an engineer. Since seniority does not give the members of non-operating unions the same measure of security as it does to non-operating unions, their need for union shop protection is very real. This insistent need of union shop has been strongly voiced by the non-operating railroad unions in recent years.

Fifteen cooperating railroad unions, affiliated with the Railway Labor Executives Association, in the contract proposals submitted to the nation's railroad carriers on September 25, 1942, included the following proposal for a union shop clause:

> "We propose that you agree: that all employees represented by this organization and who are eligible to membership in this organization shall become members in good standing of this organization within sixty days from the date this proposal is accepted and made effective and shall remain members in good standing of

[103] Rev. Dr. Jerome L. Toner, *Hearings* before the Senate Committee on Labor and Public Welfare, Part 3, p. 1447, Feb. 26, 1947.

this organization as a condition precedent to continued employment; provided that these conditions shall apply to employees hired after date they are effective, but these employees will be allowed a period of ninety days from date hired to secure such membership." [104]

Charles J. McGowan, then vice-president of the International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America, as spokesman for the 15 cooperating railway labor organizations, appeared before the Emergency Board on April 16 and 17, 1943, and presented on their behalf a comprehensive statement in support of the union shop proposal, which was a major issue in the dispute between the unions and the carriers.[105] In his testimony, Mr. McGowan indicated that "these railroad labor organizations in the past have refrained from advocating the union shop agreement, or any other type of union security. • • • However, the affairs of men and nations change with the march of time, and it is now our considered opinion that a union shop has become necessary • • • to preserve these organizations, their American ideals, and their American standards." [106]

Mr. McGowan made it plain that the need for union security on the railroads was intensified in recent years by the appearance of rival unionism and concerted raids by rival organizations upon the membership of the established labor organizations. He showed that a propaganda campaign was conducted by the rivals, seeking to discredit the established unions and the Railway Labor Act itself.[107] He also submitted evidence that the United Railroad Workers Industrial Union, chartered by the C.I.O. on August 6,

[104] *Transcript of Proceedings of the National Railway Labor Panel Emergency Board*, Chicago, Ill., "Fifteen Cooperating Labor Organizations-Union Shop—Wage Increase Case, 1943," Vol. 38, pp. 5325-6.

[105] *Ibid.*, p. 2325 ff.

[106] *Ibid.*, p. 5358.

[107] *Ibid.*, p. 5359.

1941, was engaged in a nation-wide effort to organize railroad workers into unions formed along industrial lines, instead of craft or class.[108] Similar evidence was presented of raids made by other rival labor organizations invading the railroad field and a tabulation from the records of the National Mediation Board showing the effects of these raids.[109]

In addition to showing the applicability of the union shop to the railway industry and to the organizations covered by the Railway Labor Act, Mr. McGowan stressed the fact that many of the organizations he represented had membership employed in other industries, as well as under the terms of the Act. In virtually every one of the trades, closed shop or union shop conditions were established for the members of the same union in these other industries, with satisfactory labor relations maintained there under union security agreements. Thus the union having the protection and security of union shop conditions in the nation's shipyards, for example, was artificially and arbitrarily deprived of such security on the railroads, despite the fact that many of the workers were doing identical work under very similar conditions.[110] In such occupations the union shop is equally necessary and beneficial, regardless whether the workers are employed in a railroad shop or in one not serving the railroad transport system.

The Emergency Board considering this question in 1943 did not pass on its merits. While the question thus remained unresolved, the need of railroad unions for union security became increasingly urgent, with the existence of the established standard railroad unions threatened more gravely than ever before. According to the National Mediation Board, most of the representation disputes in 1946 consisted of controversies between national organizations

[108] *Ibid.*, vol. 39, pp. 5362-5 and Exhibit No. 105.
[109] *Ibid.*, p. 5366 and Exhibit No. 105.
[110] *Ibid.*, pp. 5294-5323 and *infra, passim.*

rather than attempts to secure bargaining rights for employees previously unrepresented by unions.[111] In some situations, rival unions were successful in their raids on the membership of the established standard railroad labor organizations and secured bargaining rights for the workers concerned.[112]

Important also was recent rapid increase in the representation disputes among airline employees, also subject to the terms of the Railway Labor Act. As the National Mediation Board reported in February 1947, "At the present time, there is considerable organizational activity among airline employees by organizations not heretofore interested in that field. New problems, particularly relating to craft or class, will require further consideration and determination by the Board during the coming year."[112a]

Instability and disruption constitute an already serious and growing threat to collective bargaining relations in the large and vital area of employment subject to the Railway Labor Act. The established railway labor unions and other established unions in this field, such as the Airline Pilots' Association, properly insist on the union shop as an instrument of stability and peace in industrial relations. Anyone who asserts today that the union shop is not desired or not needed by unions in the railroad and other transportation fields, either chooses to ignore the established facts or deliberately distorts the truth.

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[111] *National Mediation Board, Report to Congress for the Year Ending June 30, 1946* (Rendered February, 1947). See also 19, *Labor Relations Reference Manual*, 92-94.

[112] District 50, United Mine Workers of America, gained representation rights for brakemen and ticket collectors on the Long Island Railroad. On May 6, 1947, as a result of an election, with National Mediation Board certified the Brotherhood of Railroad Trainmen as representative of these workers. (Nation Mediation Board, Case No. R.-1809). On June 30, 1947, the United Railroad Workers of America, CIO, won bargaining rights for shop crafts, except machinists and blacksmith, on the Pennsylvania Railroad, National Mediation Board, Case No. R.-1767).

[112a] *Ibid.*

VI. BRITISH EXPERIENCE WITH THE CLOSED SHOP

Opponents of the closed shop often point to the experience of Great Britain as justifying their contention that the closed shop is not necessary for industrial peace. They argue that the closed shop does not exist in Great Britain and that the mature and generally peaceful system of industrial relations which has developed there has been aided by the absence of closed or union shop agreements. For example, Donald R. Richberg, who assisted in the drafting of the Taft-Hartley bill and whose opposition to the closed shop has been given wide newspaper publicity, makes the following bold statement in an article in the *New York Times:* "It is a fact that in Great Britain the unions are so powerful that there is a labor government; and yet the closed shop is practically unknown."[113] This assertion is false. Yet the enactment of national, as well as state, legislation to outlaw the closed shop has been urged because Great Britain is alleged to have done so well without it.

The existence, wide acceptance and importance of the closed shop to industrial relations in Great Britain are conclusively proved by a thoroughly documented study recently completed by the Rev. Dr. Jerome L. Toner, of St. Martin's College. This definite study, the result of extensive research, served as the basis of Professor Toner's testimony on this question before a Senate Committee in February, 1947.[114]

As shown by Dr. Toner, the closed shop existed in Great Britain for nearly 1,200 years. Closed shop conditions were

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[113] The *New York Times*, Magazine Section, January 26, 1947.

[114] Hearings before the Senate Committee on Labor and Public Welfare, on S. 55 and S. J. 22, 80th Congress, 1st Session, Feb. 26, 1947. Part 3, pp. 1443-1446. See also, Part 2, p. 1000. This testimony and Dr. Toner's summary of his findings have provided the source material for this part of our brief.

universally practiced by the guilds which were dominant between 800 to 1800 A. D. At the beginning of the 19th century, all combinations of workers were outlawed. The power of the guilds had been broken by the advent of the factory system. But unions carried on, despite the law, and were spearheaded by the closed shop. Between 1825 and 1875, the restrictions on unions were lifted, but the closed shop was outlawed. However, as Dr. Toner states, the closed shop "lived on and formed the core of the new unions which sprung from the guilds." [115]

During the last quarter of the nineteenth century, the chief issue on the British labor scene was the closed shop. Unions clung to the closed shop principle against widespread opposition of employer groups, in a struggle which foreshadowed the developments on the American scene in the early years of this century. It was not until 1898 that British unions won their fight for the closed shop. In that year, the House of Lords, as England's highest court, in the famous case of *Allen* v. *Flood*,[116] ruled that union members had the right to refuse to work alongside nonunionists.

By the turn of the century, the closed shop principle had been firmly established as the prevailing practice in many sections of British industry. The wide application of the closed shop principle, even at this time, is shown by the statement of the renowned authorities on British trade union history, Sidney and Beatrice Webb:

> "• • • any student of Trade Union annals knows that the exclusion of non-unionists (the closed shop) is coeval with Trade Unionism itself • • • and it is especially in the old-fashioned and long established union that we find the most rigid enforcement of membership. In the best organized industries, whether great or small, the compulsion is so complete

[115] *Ibid.*, p. 1444.
[116] *A. C.* 1, 1898.

that it ceases to be apparent. No man not belonging to the union ever thinks of applying for a situation, or would have a chance of obtaining one. It is, in fact, as impossible for a non-unionist plater or rivetter to get work in a Tyneside shipyard, as it is for him to take a house in Newcastle without paying the rates." [117]

After the 1898 decision, the employer opposition dominated and the closed shop became generally accepted in the well-organized British industries. There were, of course, a number of disputes between unions and employers over the acceptance of the closed shop principle. According to the 1926 report of the Balfour Committee on Industrial Relations, 15 per cent of the labor disputes during the 1910-1924 period were caused by the employment of "a particular class of people," the official British phraseology for the hiring of non-union workers in a shop where union members were enforcing the principle of the closed shop.

In the past twenty years, the only serious controversy over the closed shop in Great Britain and the basis for much of the current misstatements concerning the prevalence of the closed shop there, relates to government employees. In the Trade Disputes and Trades Unions Act of 1927, passed after Britain's general strike of the previous year, local and public authorities were forbidden to make closed shop agreements or enforce closed shop conditions. It is significant, however, that in framing the Act, adopted at the time of the greatest strain to the country's industrial relations, the Parliament did not consider it either lawful or necessary to prohibit the closed shop in private industry. This in itself was an acknowledgment that the closed shop principle had become part and parcel of British industrial practice. In May 1946, by an act of Parliament this restriction on the closed shop was lifted, thereby making legal the

[117] *Industrial Democracy*, by Sidney and Beatrice Webb, London, 1897, p. 214.

closed shop even for public employment. This enactment precipitated a lively political debate, but the action of Parliament was not rescinded.

During this controversy, the British Trades Union Congress met at its annual session. Commenting on the closed shop in his presidential address, Mr. Charles Dukes well summed up the position of the closed shop in Great Britain today:

> "the closed shop was nothing new in British trade union practice. It meant for them the well-founded claim that workers in an industry or an establishment covered by union agreement should be in their appropriate unions. The 100 percent union shop was a recognized objective of trade union policy and organization. It exists today in industries where unionization was so strong that managements were constrained to recognize that the holding of a union card was a necessary condition of employment. It was logical and consistent to insist that where wages and conditions of employment were determined by union negotiations the workers who benefited by such agreements should join the unions concerned in making them. The non-unionist often sought to justify his position on the ground of personal freedom, but no consideration either of ethics or expediency could justify a man or woman taking without return the benefits of sacrifices made by their fellowworkers." [118]

A similar comment comes from a British opponent of the closed shop, Mr. Dingle Foot, who wrote frankly in the London *Spectator:*

> "There is nothing new about the closed shop, as such. For at least half a century it has been a familiar feature of the industrial landscape. As long ago as 1898 the House of Lords decided that a group of workmen were fully entitled to withhold their labor rather than

[118] Trades Union Congress, Annual Report, 1946, p. 225.

work with members of a rival organization (boilermakers refused to work with shipwrights who had performed boilermakers' work at another plant) and that, where they decided to do so, no action for damages would lie. The exclusion of non-unionists from employment in particular factories or enterprises is a phenomenon to which we have long grown accustomed, and in many cases it is looked upon with favor by the employers themselves. It is by no means any coercion from its employees, to require every applicant for a job to produce his trade union card. Practices of this kind are no doubt open, in theory at any rate, to serious objections. They are, however, so well established and so widely accepted that they would never by themselves have given rise to the present controversy." [119]

The historical development and the present status of the closed shop in Great Britain are well summed up by Dr. Toner:

"This very sketchy summary of the closed shop in Great Britain, taken from manuscript ready for publication, attempts to indicate that the closed-shop principle, custom and practice of the Merchant and Craft Guilds, Friendly Societies, and Trade Unions have been a part of the industrial, economic, and even political life in Great Britain for nearly 1,200 years. During the decay of the guilds and during the period of the Anti-Combination Acts—1799 to 1825—it existed, but with difficulties. From 1825 until 1898, when it was for the first time declared to be legal by the highest court in the land, the House of Lords, its use increased gradually against strong employer opposition. From 1898 until 1927 it was increasingly accepted by Government, unions, employers, and the public. From the enactment of the 1927 Trade Disputes and Trades Union Act until its repeal on the 22nd of May 1946,

[119] "The Closed Shop" by Dingle Foot, *Spectator*, No. 6170, Sept. 28, 1946, p. 305.

the closed shop was made illegal for local and public authorities. However, from 1898 down to the present day the closed shop has increasingly been a common practice in industrial relations outside of local and public authorities. And since May of 1946 the use of the closed shop by local and public authorities has created a 'political-closed-shop-crisis.'

"The American and British closed shop, generally speaking, are substantially the same. • • • In the United States the 'closed' shop and the 'union' shop differ in as much as in the former the employees must be union members when hired—and they are generally hired through the union—while in the latter anyone may be hired, but for both of them membership in the union is a condition necessary for permanent employment. Those who will not join the union or refuse to keep in good standing in the union will be discharged or sacked. In the United States the closed shop (or union shop) conditions are generally *written* into the agreement or contract; in Great Britain, they are enforced either by 'understanding', 'custom', or 'unofficial' strikes. If a non-union employee will not join the union, the union members refuse to work with him and walk off the job. The *number* of those strikes is indefinite for most of them last but a very short time—often less than a day. The official record in the Ministry of Labour Gazette does not take cognizance of strikes that last less than a day." [129]

VII. THE MORAL BASIS OF THE CLOSED SHOP

We have shown that the institution of the closed shop is amply justified as an instrument of economic advancement, not only of the workers directly concerned, but of the whole community. In addition to the economic justification of the closed shop agreement as indispensable to the advancement of public welfare, we must also take into ac-

[129] *The Closed Shop in Great Britain*, by Rev. Dr. Jerome L. Toner, mimeographed, 1947, p. 8.

count the higher considerations of social justice which spring from the fundamental concepts of fair play, equity and justice among men, and particularly among workers whose livelihood and very survival depends on the wage income derived from their work. The moral justification of the closed shop rests squarely upon these considerations.

A. The Right to Work

The most misleading and yet most widely used argument against the closed shop is that it deprives persons of their right to work. Opponents of the closed shop often use beguiling slogans and plausible, yet false, cliches to foist their argument. They usually contend that "No union should be permitted to deny any person his inalienable right to work at the pursuit of his choosing"; "The right to work is a God-given right which does not permit interference by any labor organization", etc. Let us consider the validity of these and similar assertions.

1. *Even the right to uncompensated work is limited.*

In a free society, anyone is free to do as he pleases, provided his actions do not conflict with the freedoms or welfare of others. Work done in pursuing one's hobby or avocation may be onerous or pleasant, strenuous or light; what that work is, or how or when or where it is done is wholly a matter of free choice and control of the person who does it, provided his pursuit does not conflict with freedoms, needs, interests or property rights of others in the community. The person performing such work has no master. He is not subject to outside control, except for such limitations imposed upon him by law and custom.

Even the right to perform such work, which is uncompensated or is not subject to outside control, is a limited right, as are other basic rights and freedoms. As Mr.

Justice Brandeis pointed out, the right to free speech does not include the right to shout "Fire!" in a crowded theatre. Freedom of worship does not entitle one to hold services at will in the middle of an express highway. The right of assembly does not include the right to hold a political rally in a courtroom whenever one chooses. And the right of private property does not include the right to deny access to that property to officers of the law.

In the same way, the right to do even uncompensated work is neither inalienable nor unlimited. It does not entitle one at will to direct city traffic at the Main street intersection, to carve totem-poles out of city park trees, to exterminate rabid dogs by drowning them in the city reservoir or to turn the neighbor's lawn into a baseball diamond.

In other words, work, even in its broadest and loosest sense, is not a matter of an unlimited and unqualified right. It is severely limited and conditioned as to time, place and substance by the rights of others and the rules imposed by society to maintain order and to safeguard the safety, welfare and freedom of its members. Here, as elsewhere, the welfare of the many is accorded higher consideration than the freedom of the individual and limits that freedom.

2. *The "right to work" refers to work for a living.*

The phrase "the right to work" as used by the opponents of the closed shop does not refer to activities which are not subject to compensation or outside control. It is not concerned with the person's right to work in his own cabbage patch as much as and whenever he pleases, to grow cabbage for his own dinner table. The term "the right to work" refers solely to *compensated employment*, to work performed to earn wages.

Work for wages, or other compensation, for most wage and salary earners means the source of livelihood for them

and their dependents. The great majority of family bread-winners in America, earn their living in employment for wages. To them the "right to work", therefore necessarily means the right to *work for a living*. The whole question involves not merely the person's performance of labor without regard to the pay his labor earns. It must necessarily mean and does mean *both* the work performed *and* the pay received for that work.

The pay accepted by one worker directly and necessarily, affects the pay of other workers doing similar work, and thus affects their livelihood and their very ability to survive. Therefore, the individual's right to work for particular pay is limited by the right of other individuals to safeguard their standard of compensation from impairment or destruction.

3. *Compensated job is the creature of the employer.*

Before anyone can assert a claim on any particular job, that job must first exist. Every job is the creature of the employer in the first place. There can be no absolute right to the possession of a thing which does not exist, unless someone else chooses to create it at will, and which someone else has complete power to eliminate at will at any time, once he created it. By the same token, there can be no absolute right to a job which the employer creates or terminates at will. The creation and continuation of a job is a matter of complete discretion of the employer. There is no compulsion upon the employer to engage in business other than the business he chooses or continue in that business against his wish. It is self-evident that the job must be first created by the employer and compensated work on that job must exist through employer's discretion, before there can be any collective bargaining about its terms and conditions.

4. *The right to compensated work is controlled by the employer.*

Can anyone walk into a local power plant and successfully demand that you be given an engineer's job at standard pay, as a matter of right? Suppose you try it. The plant manager will no doubt point out, that you have no *right* to work there as an engineer or in any other capacity. He will want to know whether you are or are not able to do engineer's work. He may say that, if the management is satisfied that you are qualified, the management may, *in its discretion*, consider you for a job when a vacancy occurs. Try this same demand for a job, as a matter of right, in your local lawyer's office or any other place of employment. You will soon be convinced that in the society in which you live, you do not possess an inalienable right to work as, say, a member of the firm of Cravath, Swaine & Moore, as a Class A electrician in the nearby plant, or as a star in a Hollywood motion picture studio at $5,000 a week.

Samuel Gompers might well have been pleading the present case when, many years ago, he stated, replying to the challenge of the validity of a closed shop contract:

> "Is an outsider to be heard that the agreement between the employer and employee must not be performed because perforce thereof the employer can no longer keep him in service? How can he be heard unless he has some vested right of retention by his employer? Assume that the agreement is performed, what results to the plaintiffs who refuse to join the union? Their discharge from this employment, but is not the employer free to discharge them even without reason or for any reasons which seem to him sufficient, no matter how shortsighted, unjust or arbitrary? Independent of the obligation or contract, the workman may quit employment and the master may discharge the workman, beyond the interference of the courts." [121]

[121] *American Federationist*, Vol. XII, p. 77.

In law and in fact, the relationship between the employer and his employee is a master-servant relationship. The control over hire, tenure, terms and conditions of employment, as well as over the conduct and actions of the employee in the performance of his services is vested wholly in the employer. This relationship can be effectively conditioned only by a collective agreement between the employees and the employer. If the closed shop agreement is dissolved by law, the non-union employee's right to work for the employer in question is not enhanced one iota: his hire and tenure still remain a matter of the employer's choice and control.

The practical choice for a worker confronted with a union shop is not between joining the union or starvation, as is sometimes argued. As we have shown,[122] while 85 per cent of workers in manufacturing, covered by collective bargaining agreements, were covered by the closed shop or related union security clauses in 1946, 58.5 per cent of all workers in manufacturing were subject to union security provisions. There were jobs in every industry and every occupation not requiring union membership as a condition of employment. Furthermore, most closed shop agreements do not require that only union men be hired. As stated by Professor Toner, "It is not the essence of the closed shop that the employer must hire union men only. An analysis of 7,000 contracts examined by the Bureau of Labor Statistics reveals that 'a closed shop agreement simply requires that all workers hired by the employer shall join the union at the time of hiring or within a stated period afterwards.' "[123]

What is important, is that if the union shop is eliminated or substantially curtailed, under competitive conditions,

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[122] Part II, pp. 17-19 and Appendix B.

[123] Toner, *op. cit.*, p. 165; Brooks, *Unions of Their Own Choosing*, p. 185.

the non-unionist's choice is likely to prove to be the choice of a non-union job *and* starvation. For the need for livelihood will ultimately force the non-unionist to accept work on employer's terms, no matter how low those may be. As Samuel Gompers pointed out, "A man who must sell his labor upon such conditions as his employer must determine, cannot by any form be regarded as either free or enjoying liberty." [124]

Consider the "right to work" in employment where there is no collective agreement and no union security. In such employment, the rate of pay, the hours of work and working conditions are a matter of employer's control. The employer can set the terms of employment arbitrarily and, if he wishes, be guided by nothing but his whim. While in some areas of employment he must comply with certain minimum standards, set by law, these generally do no more than prescribe the limits of discretion, leaving the employer's discretion complete within those limits. Thus, minimum wages prescribed by law generally apply only to the lowest classification. The great majority of the jobs within the coverage of such laws are not subject to their direct regulation. Moreover, a very large proportion of employment is not even covered by laws prescribing minimum standards of work and compensation. In such employment, the employer is completely free to pay his workers what he chooses and do with them as he pleases.

5. *The right to work is meaningless, unless it is the right to work at fair pay.*

The "right to work" in compensated employment is obviously an empty right, unless it includes the right to fair and equitable compensation for such work. The real right to work is the right to work for fair pay. It must

[124] *American Federationist*, Vol. XII (1905), p. 75.

mean the right to earn a living commensurate with the standard of compensation established for the work performed. The right of a machinist to work for 5 cents an hour has no real meaning to him, if the machinist is wholly dependent upon his labor and skill for his livelihood. He cannot exercise it indefinitely without starving and becoming incapable to perform the work yielding the pay which sustains him. For him to insist upon the right to work at that pay would indeed be to insist on the defeat of the very right he is attempting to assert. Yet, without a collective agreement and union security, there is nothing to prevent the employer to set the pay as low as the employer pleases, or to terminate the employment of this worker and his pay on a moment's notice.

When a number of workers are competing against each other for the same job, and are confronted with the choice of either taking the job on the employer's terms or remaining jobless, the employer engaged in a competitive enterprise, has every inducement to set the pay for the work he needs to have performed at the lowest possible rate. The result is that the compensation of all workers suffers. Thus the assertion by one worker of his right to work at substandard pay violates the right of other workers to work for compensation set at a fair and equitable standard.

6. *The right to refuse to work with a nonunionist is fundamental in a free society.*

As we have already shown, the closed shop and related forms of union security lead to higher wage standards and make a fundamental positive contribution to the economic welfare of the whole nation.[125] Striving for the good of all, unionists are morally justified in their insistence that workers outside their ranks give tangible aid to the fight

[125] Part III, pp. 24-37, *supra*.

for economic justice for all who work. As stated tersely by Bishop Haas, "simple justice requires nonunion employees who enjoy the common benefits to carry their share in the common burden." [126] For unions have struggled to improve the welfare of wage earners far beyond the confines of their own membership.

In the words of Dr. Toner:

> "Much of the social progress and legislation in America has been initiated and aided by organized labor. Shorter hours, increased wages, improved conditions of safety and health, elimination of sweatshops, regulation of hours for women and children, establishment of various types of social insurance, introduction of minimum wages, the setting up of pension systems, and the organization of educational, social and recreational activities—these are the few of the achievements for which unions may claim a large share of credit. Needless to say, they were not attained without heavy financial cost and great personal sacrifice." [127]

In fact, as Gompers put it, it is impossible to concede that "the nonunion man, understanding the facts of life about him, has a moral right to accept the gains, advances and freedoms won by the united effort of those whom he refuses to join." [128] Sooner or later the moral issue involved in the anti-union stand taken by the nonunionist is likely to come to a practical test: he may be called upon to replace a unionist as a strike-breaker in a dispute over betterment of conditions; he may be favored over unionists, in order to break union ranks; or he may directly benefit from the gains won by a union through negotiation in a place where he works, yet refuse to share in the cost of winning those

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[126] *The Why and Whither of Labor Unions*, by Francis J. Haas, Huntington, Ind., p. 14.

[127] Toner, *op. cit.*, p. 172.

[128] *American Federationist*, Vol. XXIX (1922), p. 836.

gains. If he does so, the nonunionist may achieve a temporary personal gain. But that gain will be at the expense of others whose interests are common with his own. That in itself constitutes wrongdoing which cannot be morally justified. What is more, such action is bound in time to harm the nonunionist as well as his fellow-workers. Are not these workers morally justified in taking action which would prevent one individual from jeopardizing the welfare of all concerned?

The answer is given by John Mitchell, quoted by Dr. Toner, with this comment:

> "Emphasizing that the duty of the individual to society and to a class of society differs only in degree, Mitchell made this flat assertion: 'The nonunionist has no moral right to seek his own temporary advantage at the expense of the permanent interests of all workingmen. It may pay an anti-unionist to defeat the hopes and aspirations of his fellowmen, just as it may pay a man to be a traitor to his country, but neither is morally justified.' The comparison may be harsh, but the logic of the argument remains irrefutable." [129]

Refusal to accept and work with a nonunionist may, and historically often has, involve a question even more immediate and vital than that of wages and working conditions. It may involve personal safety and lives of other workers concerned. In the past, especially before workmen's compensation laws became prevalent, unions in particular plants and shops had found it necessary to exclude workers who failed to measure up to the standards of safe conduct in the course of everyday work. As described by Professor Gregory: "Their physical safety was jeopardized by

[129] Toner, *op. cit.*, p. 174, quoting *Organized Labor* by John Mitchell, (Philadelphia, 1903) p. 272.

workers who did not observe certain precautions. And employers anxious to get their work done at any price had no incentive to hire or retain only prudent men, because they were not responsible in damages to their employees who were hurt either because of careless conditions on the premises or by the negligence of their fellow laborers. The only sure way they had to protect themselves against such hazards was to see that imprudent workers stayed out of their plants. By establishing standards of work, and by insuring observance of these standards through so-called entrance requirements, members of these associations could protect themselves against incompetent workers and against their employers' tendencies to hire such labor. Furthermore, they could in this way insure maintenance at a high level of the standards of performance of their particular arts which constituted their livelihoods." [130]

In 1905 Samuel Gompers stated:

> "We assert that the union shop does not deny employment to the non-unionist; but we insist that, like all others in society, persons who are desirous of becoming beneficiaries of an agreement should become parties to that agreement, and that they should bear the equal responsibility which such an agreement involves." [131]

The final reports of two separate, important and impartial U. S. Industrial Commissions, appointed respectively by President Theodore Roosevelt and President Woodrow Wilson, gave unqualified support to the institution of the closed shop and specifically denied the argument that under a closed shop non-unionists were deprived of the right to

[130] *Labor and the Law* by Charles O. Gregory, New York, 1946, p. 118.

[131] *American Federationist*, Vol. XII, p. 221.

work.[132] In its final report, the first United States Industrial Commission said:

> "If the union is willing to receive any competent person into its ranks, no man can complain of being absolutely deprived of work because union men refuse to work with him so long as he fails to join the organization."[133]

7. The moral obligation for the welfare of all is higher than for the welfare of one.

If a non-unionist has no legal right to demand employment in a shop where his fellow workers are unionized without being required to join their organization, still less has he a moral right to do so. Legal rights of individuals and, much more, their moral rights, are based upon and conditioned by the welfare of society—the good of the whole. As we have shown, history has demonstrated that unorganized workers are usually powerless on an individual basis to secure from industry a living wage, decent working conditions or any security of employment, and that organization is necessary to accomplish these ends. The presence of non-union employees in a shop, willing to work at a lesser wage and under less satisfactory conditions than have been achieved through the process of collective bargaining, offer a pervasive threat to the maintenance of satisfactory conditions. Union members regard nonunionists, and with good cause, as potential enemies against whom the whole instinct of self-preservation rebels. Can anyone say, then, that there is any moral justification for the non-unionist to intrude himself into a shop with the avowed intention of not being bound by any of the union

[132] See quotation from Final Report of the second Industrial Commission, p. 42 *supra*.

[133] Final Report of the Industrial Commission (1902), H. Doc. No. 380, 57th Cong., 1st Sess., 1902, Vol. XIX, p. 817.

rules or regulations pertaining to the maintenance of established conditions? Has a nonunionist any moral right to withhold his assistance in the fight for improvement in working conditions and in the struggle to maintain those conditions once they have become established? On whatever grounds one may seek to excuse or rationalize such actions, they can certainly be given no moral justification.

As pointed out by a Catholic scholar, Reverend Benjamin L. Masse, "the right to work is necessarily circumscribed by his [the worker's] environment" because "a worker is not an isolated individual. He is a member of a family, of a class, a citizen of a state, a unit in a social and economic *organism*."[134] Stressing that the past has demonstrated the helplessness of unorganized workers to secure from industry a living wage, decent working conditions, or security of employment, Dr. Masse says:

> "The right of any worker to a job must be interpreted against the background of this social fact. (The history of 150 years of tears and blood to establish workers' rights.) Accordingly, instead of talking about the right of a worker to join or not to join a union, would it not seem more appropriate, and more practical, to discuss a possible duty to join his fellows in a spirit of fraternal solidarity? At any rate, where the closed shop is essential to a union's security, I do not believe that the union violates a worker's right to a job by demanding that he join the union."[135]

If the right to work be conceded its full meaning, the right to work at a fair wage and under conditions attained through joint action of workers, then the closed shop serves to advance that right and not violate it.

[134] "Does the Closed Shop Destroy the Right to Work?" by Rev. Benjamin L. Masse, *America*, Vol. LXVI, No. 16, January 24, 1942, p. 426. Quoted by Toner, *op. cit.*, pp. 183-4.

[135] *Ibid.*

B. Approval of the Closed Shop by the Church

Reverend Jerome L. Toner, the leading student of the closed shop in America and an outstanding Catholic scholar, reviews the authoritative ethical pronouncements of the Catholic Church on the closed shop and summarizes them as follows:

> "The teachings of the Popes and their interpretation and application for American industry by the Archbishops and Bishops lend substantial although not specific endorsement to the closed shop. Nowhere is it named as an evil to be condemned." [136]

When, as a part of its open-shop propaganda drive of 1921, the National Association of Manufacturers published its *Open Shop Encyclopedia for Debaters*, it cited an excerpt from Pope Leo XIII's Encyclical on "The Condition of Labor," written in 1891, in an attempt to show that the Pope wished to condemn the closed shop as a technique for protecting labor. This use of the excerpt has since been exposed as unconscionable prevarication by the NAM of the words of the Holy See. The excerpt in question speaks of associations of workingmen and makes reference to "invisible leaders" and organizations "managed on principles far from compatible with Christianity and the public well being." As has since been established, and as Dr. Toner points out "the Pope was not dealing with the methods used by a labor organization." [137] The reference was to the *secret* international control of the communist International Workingmen's Association which sought political penetration of unions. It seems also to reflect the fact that at that time members of anarchist organizations "had been paid, under the auspices of a manufacturers' association,"

[136] Toner, *op. cit.*, p. 190

[137] Toner, *op. cit.*, p. 178

to become members of unions, stir up trouble "and bring discredit upon the whole movement."[138] Ironically, the manufacturers' associations seem to have contributed to the very iniquity condemned by the Pope, which the NAM later sought to associate falsely with the closed shop. As Dr. Toner correctly comments on this Encyclical of Pope Leo XIII:

> "Significantly, the Pope did not endorse the open shop or call for measures to illegalize the closed shop. Instead, he proposed that workingmen '* * * form associations among themselves—unite their forces and courageously shake off the yoke of an unjust and intolerable oppression.'
>
> "There is closed shop confirmation in the constant commendation that Pope Leo XIII gave to the ancient workmen's guilds—the essence of which was the closed shop refusal to work with a non-member. Pope Pius XI's praise of those unions or associations which 'undertook the protection of the right and legitimate interests of their members in the hiring of their labor,' indicates approval of the proper use of the closed shop."[139]

The attitude of the Catholic Church toward the closed shop under present conditions is clearly stated by Bishop Sheil:

> "'Now,' as Pius XI has said, 'it is of the very essence of social justice to demand from each individual all that is necessary for the common good.' This means that the worker has an obligation to affiliate with the union of his occupation, whether craft or industrial. * * * And if a non-union worker in a partially organized industry is receiving a good income, it is quite probably because his non-union employer, in order 'to keep the union out,' meets, or nearly meets,

[138] *Ibid.*, p. 179, esp. footnote 15.
[139] *Ibid.*, p. 180.

the higher wage and hour standard of union establishments. Clearly such non union employees are eating the fruits of others' sacrifices. The workers in the union shops perhaps risked their jobs to get their union recognized, and they pay monthly dues to keep it going. It is a categorical injustice for non union employees, enjoying the common benefits, to refuse to carry their share of the common burden."[106]

The Conference on Church and Economic Life, convened in Pittsburgh by the Federal Council of Churches of Christ in America on February 18-20, 1947, devoted considerable attention to the closed shop issue. This conference, composed of representative Protestant laymen as well as ministers of the Church, held an extensive discussion of the ethical issues involved in union security. An attempt was made by Noel Sargeant, Economist of the NAM, and several other spokesmen of manufacturers to have the conference condemn the closed shop, but the proposal was rejected by an overwhelming vote of the delegates. A minister commented in the discussion that he, too, is required to be a member of his church, before he can serve as a minister.

The views of the Federal Council of Churches are still expressed by its statement on the *Social Ideals of the Churches*, as revised and adopted in 1932:

> "The right of employees and employers alike to organize for collective bargaining and social action; protection of both in the exercise of this right; the obligation of both to work for the public good."

At its meeting in 1940, the Council reiterated this ideal and stated that at the time of preoccupation with national defense, "there is special reason for the maintenance of this principle."

[106] "Labor and the Catholic Church," Sermon delivered by the Most Rev. Bernard J. Sheil, D.D. on Labor Day, 1944.

In 1944, the General Assembly of the Presbyterian Church in the United States of America, declared, in part:

> "The closed shop is one method or instrument, among many, representing a stage of development in collective bargaining. When used, it should be adopted voluntarily by an industry. . . . The individual Christian is called upon to approach the issue of the closed shop neither with indiscriminate emotion, nor with preconceived theory. We believe that there is nothing in Christian faith and principle that either supports or denies the closed shop, as such on ethical grounds."

The Synagogue Council of America, a widely representative Jewish body, said in 1945: "The same rights of organization which rest with employers rest also with those whom they employ."[10]

The National Religion and Labor Foundation, a representative, interdenominational body has this to say about the closed shop:

> "It is charged that the closed shop is un American. Therefore, labor haters are setting about to prohibit it by law. This falsehood is perpetrated on the public, despite the fact that this type of contract has come to predominate in the leading industries, such as steel, clothing, fur, rubber, textile, printing, maritime and electrical, and also has the endorsement of large sections of management. The closed shop means union security, and union security means more peace in the plant and less frustration in the home. In cases when management is still unfriendly, it prevents the use of non union people in the plant in creating friction. The closed shop is based on the established American

[10] *Walking Together: Religion and Labor*, The National Religion and Labor Foundation, p. 23

principle that those who share in benefits should share in responsibilities."[142]

A representative attitude of religion toward the closed shop is expressed in the following statement signed by 645 clergymen of various denominations, representing 43 states and the District of Columbia, and presented at the White House in June, 1947, in their appeal against the enactment of the Taft-Hartley Bill:

> "The closed shop and the union shop developed historically as a defensive union measure against determined employer resistance to independent unions. Many industries such as clothing have combined closed shops with some of the best and most constructive industrial relations in America. But in addition, just as every town resident must share the cost of community services by paying taxes, so every worker in the industrial community bears an obligation to share the costs of collective bargaining through the agency designated by a majority of the employees. Just as some towns have occasionally enforced tax collections under tyrannical administrations, so a few industries have had closed shops under tyrannical and dishonest union controls. But the remedy lies, not in abolition of compulsory union dues or town taxes, but rather in the enlightened concern of free community and union members. The legislation would destroy constructive industrial relations already achieved."[143]

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[142] "Economic Justice," Bulletin of the National Religion and Labor Foundation, Vol. XV, No. 7, April, 1947, p. 4.

[143] Statement by National Clergymen's Committee on the Taft-Hartley Bill, Rev. Sheldon Rahn, Secretary, presented at the White House in June, 1947.

VIII. THE CLOSED SHOP DOES NOT BREED ABUSES

Over a period of years, opponents of the closed shop, led by the National Association of Manufacturers and the U. S. Chamber of Commerce, misinterpreted and distorted facts and figures in their attempt to place the responsibility on the closed shop for industrial unrest, restrictive industrial practices, inefficiency, high costs, racketeering and abuses of all kinds. In its *Open Shop Bulletin*, the N. A. M. persistently blamed undue costs on closed shop conditions, charged the closed shop with being the source of wrongdoing, and even attempted to show that the closed shop results in lower wages for workers.[144] The U. S. Chamber of Commerce often followed in the same vein.[145] These charges and allegations can be readily shown to be wholly without foundation.

A. The Closed Shop Does Not Breed Unrest

We have already shown, that the evidence is conclusive that the closed shop has made a constructive contribution to industrial peace and that, as a matter of proven fact, peaceful labor-management relations have been far more prevalent in the industries in which closed shop agreements have had wide application.[146] Referring to the "industries in which the closed shop is now predominant," Professor Witte states: "With the exception of coal mining and the maritime industries, these industries have been much less

[144] *Open Shop Bulletin*, National Association of Manufacturers, esp. No. 12, 13, 15 and 26. As Dr. Toner states, the N. A. M. "endeavors to manipulate statistics to show, for example, that the average yearly income of non-union miners is higher than that of the union miners." *Op. cit.*, p. 133.

[145] For example, in 1941, A. W. Hawkes, then President of the Chamber, condemned the closed shop as monopolistic and contrary to man's God-given right to work. See "Right Underlying All Rights" by A. W. Hawkes, *Nation's Business*, Vol. 29, August, 1941, p. 15.

[146] Part IV, B, pp. 46 ff., *supra*.

troubled by strikes than the mass production industries in which the closed shop and the union shop are both exceptions. In only 3 of the 29 major strikes of 1946 (which accounted for more than three fourths of the total lost time in this worst of all years for strike losses) was union security an issue and even in these three strikes this was only one of the issues. Let the closed shop be outlawed and the union shop be restricted and this legislation be used to get rid of long established union security agreements, this issue very probably will again become the major cause of strikes and great industries which have been pretty free of strikes will be thrown into chaos."[147]

Although complete figures for 1946 are not yet available, the Bureau of Labor Statistics has summarized the information for the major strikes of that year. Their summary discloses the following: For the first six months of 1946 the closed or union shop was involved in 37 stoppages affecting 5,680 workers; the closed or union shop, together with wages and hours was an issue in 170 stoppages affecting 79,300 workers. This amounts to approximately 8 percent of the total strikes but only about 3 percent of the total workers involved. Special information is available for the 29 stoppages during 1946 which directly involved 10,000 or more workers. These stoppages were the cause of most of the total idleness caused by stoppages during the entire year. Of these 29 strikes, none were primarily concerned with the question of a closed or union shop. In only three was the union security even a secondary issue. Only four of the stoppages took place in predominately closed shop industries, and in all four cases the major issue involved was the question of wages.

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[147] *The Closed Shop and Industry Vs. the Collective Bargaining*, by Edwin E. Witte, Chairman, Department of Economics, University of Wisconsin; address delivered at the Symposium on Current Labor Problems, University of Washington, May 22, 1947.

The record of work stoppages in 1946 follows closely the pattern prevailing in the last two decades. Official government figures on work stoppages, presented in detail in Appendix C, show that between 1927 and 1945, the number of work stoppages averaged 2,392 per year. Of this number, work stoppages due to disputes in which closed or union shop was at issue, averaged only 171 per year. This shows that, on the average during the entire period, stoppages due to closed or union shop disputes represented as little as 7.2 percent of the total work stoppages. The ratio of the idleness caused by these disputes over closed or union shop was equally small, representing only 7.1 percent of idleness caused by all work stoppages.[48] The inevitable effect of legislation outlawing closed shop agreements will be to intensify industrial strife by bringing the issues of union security, union recognition and employment of non-union workers, issues which in recent years have played an insignificant part in industrial strife, once again to the forefront of labor disputes.

It is indeed notable that in the years when the institution of the closed shop was under the heaviest attack by the National Association of Manufacturers and its anti-union abettors and accomplices, these issues of union acceptance, employment of unionists and union recognition were the dominant cause of strikes and lockouts. In 1904, at the height of the NAM-sponsored open shop drive, 46 percent of all strikes and nearly 60 percent of all strikers were engaged in disputes over these issues. As shown in Appendix D, where these figures are detailed, the proportion of strikes due to "recognition of the union and union rules," and "employment of certain persons" (classifications under which the closed shop issue was then reported) rose from about 15 percent in 1881-85 to 40-45 percent in 1900-05.

[48] For source and details, see Appendix C, *infra*.

During the period between 1881 and 1905, half of all lockouts with 40 percent of all employees involved, were over the issues underlying union security and union recognition.[149]

However damaging this result of the legal prohibition of the closed shop, it will account for only a part of the damage such prohibition will inflict on industrial peace. It will mean that thousands of firmly established and peacefully administered collective agreements in the leading industries of the nation will be disrupted and cooperation and mutual confidence, built up over many years between labor and management, will be irreparably damaged or altogether destroyed.

All evidence points to the conclusion that far from being a major cause of work stoppages the issue of the closed or union shop was an important cause of strife only at a time when employers were bitterly opposed to the spread of unionism, and that in recent years its importance as a factor responsible for work stoppages progressively declined to the point of becoming negligible.

B. Closed Shop Does Not Lead to Restricted Production

Opponents of the closed shop allege that the closed shop and other forms of union security result in restrictions of output and other interferences with efficient production. The weight of evidence, however, is overwhelming in proving not only that the closed shop in itself does not bring about such results, but also that high efficiency and maximum productivity, maintained over an extended period of time, have best been achieved under closed shop conditions.

Consider, for example, the apparel industry—the largest

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[149] For source and details, see Appendix D, *infra*. Statistical reporting of strikes and lockouts was initiated by the Commissioner of Labor in 1881 and maintained through 1905.

manufacturing industry operating almost exclusively under closed shop and union shop agreements. Unions in this industry have developed a high degree of union-management cooperation for the specific purpose of achieving efficient operation. The International Ladies' Garment Workers' Union of America has achieved wide recognition for its systematic work to improve operations and to remove whatever obstacles may be placed by either workers or employers in the way of attainment of full production. The union maintains an engineering department, studying production techniques and recommending improved procedures.

To engage in such a program is in the interests of the union as well as the employer. The union's activities, as a matter of fact, are not confined to the maintenance of high efficiency in manufacture. It has a positive concern also in maintaining a high quality of the product, speed of delivery and many other matters that have a direct bearing on the productive and profitable conduct of enterprise. As President Dubinsky of the ILGWU pointed out in his testimony on the anti-closed shop provisions of the Taft-Hartley Bill, "There is no other basis on which fair labor standards and legitimate competition can be maintained in our industry. The proposed legislation would bring back unfair competition and exploitation of labor." [150]

The International Printing Pressmen's Union of America, whose membership is employed in the printing and publishing industry where the closed and union shop conditions are also predominant, has likewise made a major contribution to improved production standards, a service widely acclaimed by the employers concerned. The union

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[150] Statement of David Dubinsky, President of the International Ladies' Garment Workers' Union, A. F. of L., Before the Senate Committee on Labor and Public Welfare, 80th Congress, 1st Session, February 25, 1947.

maintains an Engineering Department at its headquarters at Printsmen's Home, Tennessee. The primary responsibility of the Department is to study the production record and standards of quality and technology maintained by the firms having agreements with the union's affiliates. Recommendations on technical improvements in production are being constantly made by the union to employers in the trade.

Ranging from chemical workers to meat cutters, systems of union-management cooperation to maintain high production have been successfully maintained by A. F. of L. affiliates under closed shop conditions over a period of years.

In contrast with this record, is the conclusive evidence that in the absence of union organization and with the consequent instability and insecurity, restrictions of output are widely prevalent, and are even more likely to occur in unorganized industries. A detailed study, based upon an exhaustive field survey, made by Dr. Stanley B. Mathewson, provides ample proof of this fact.[151]

The record of experience shows that restrictive practices arise out of circumstances unrelated to union security. Under such circumstances they will occur regardless of any provision for union security and in the absence of any union organization.

C. The Closed Shop Does Not Interfere With Management Prerogatives

It is alleged that the closed shop restricts the exercise of the management's proper prerogatives. Especially, it is claimed, the closed shop serves to place undue limitations on the management's freedom with respect to hiring and tenure of employees.

[151] *Restriction of Output Among Unorganized Workers*, Viking Press, 1931.

A thorough study of this aspect of the question has been made by Professor Slichter. As he points out, restrictions on hiring are not the prevailing characteristic of union policy and are strongly dealt with whenever they occur in local situations.

> "The tendency of local unions to pursue restrictive membership policies is usually discouraged by the national officers. Since the bargaining power of the union depends upon its control of the labor supply, a union which excludes workers is undermining its own bargaining power. The national officers are usually well aware of this." [132]

Nor is the operation of the closed shop agreement likely to lead to the employment of inferior workmen. According to Professor Slichter:

> "It is unlikely that the closed or preferential shop compels employers to accept inferior men in appreciable numbers provided the doors of the unions are open to new members. The reason is obvious. A union which is strong enough to gain the closed or the preferential shop in many plants in the community is also likely to attract most of the best mechanics in the trade. Men may be reluctant to join a labor organization when they fear that membership may hinder them in finding employment, but they are usually eager to join when membership helps them to obtain work. Consequently, the very success of a union in establishing the closed or preferential shop in an appreciable part of the industry helps it to attract the best and fastest workers in the trade. In the cities where the building trades unions are strongest, for example, employers testify that the best mechanics are union members. Those on the outside consist largely of men who for one reason or another find difficulty in commanding the

[132] *Union Policies and Industrial Management*, by Sumner H. Slichter, Washington, 1941, p. 64.

union scale or who work in branches of the trade which union does not control." [153]

From his first-hand study of the problem, Professor Slichter draws the following significant conclusion:

> "In the minds of American employers the expression 'closed shop' has been a symbol of union domination. This is a mistake. An assured status for the union is not a guarantee of successful union-employer relations but is a prerequisite, and the closed shop or its equivalent is one way of assuring the status of the union.
>
> "The employer is likely to have more freedom in shops where the status of the union is established than in one where its position is more or less precarious. Where the union is not secure, it is compelled to attempt to restrict the employer's discretion at every point where he may discriminate against union members in favor of non-members. • • • Where the closed shop exists, however, the union has less at stake in many decisions of management. Hence, it is not in a position to insist upon controlling these decisions. This is why more managerial discretion may be permitted in a closed shop than in an open one. The comparison of the layoff provisions in closed shop and open shop agreements made earlier in this chapter bears out this conclusion." [154]

D. The Closed Shop Does Not Result in High Costs and High Prices

The argument of the opponents to the closed shop runs through the gamut of restrictive practices falsely attributed to it, ending on the claim that their combined effect inevitably results in disproportionately high prices for goods made and services rendered under closed shop conditions. The

[153] *Ibid.*, pp. 73-74.

[154] *Ibid.*, p. 95.

invariable glaring omission in this argument is the evidence that would bear it out. The evidence we do have completely disproves this contention.

No one could make the claim, for example, that the Ford is a disproportionately high priced car. Yet the Ford Motor Company, which has maintained a closed shop agreement for a decade has presented a notable example of the full acceptance of the closed shop principle. It is a well-known fact, moreover, that the leading manufacturers of men's hats in the *low-price* field are the very ones who operate under union shop conditions, being able to maintain their low price position profitably in this highly competitive industry. What is true of automobiles and hats, is also true of shoes, dresses and a multitude of other products.

Highest efficiency, which makes possible lowest unit costs, has been attained under closed shop conditions. This was dramatically demonstrated through the entire range of war production at the time of great national stress. When the job had to be done fast and done well, whether it was a Navy base, a Kaiser ship or a Boeing plane, it was done under a closed shop agreement. The record for speed in permanent home construction was broken during the war under closed shop conditions. In every branch of industry and trade where the closed shop has been firmly established, the record shows the predominance of better qualified, more efficient workers, whose improved production makes possible lower unit costs.

E. The Closed Shop Is Not Monopolistic

The argument that the closed shop is inherently monopolistic is likewide without validity.

Combinations of working people into labor organizations for their mutual aid and protection does not constitute a monopoly or contract in restraint of trade. Such combina-

tions do limit competition among men against each other to sell their services to an employer. But labor of a human being is not an article or commodity of commerce. Unions are associations of men constituted by them for self protection, not for profit. They are voluntary institutions, governed by the majority rule of their members. And, above all, they do not and cannot alone set an arbitrary standard of compensation their members receive for their work. Wage rates established under closed shop contracts are set *by agreement with employers.* Without such agreement, the union is powerless to maintain the standard it seeks.

As stated by Dr. Teller, in his standard treatise on the law of labor relations:

> "Courts, * * * which grant validity to closed shop contracts *even though governing an entire industry*, do so upon the plausible ground that employers have a right to be governed by those union rules only which likewise apply to competitors. Contracts generally applicable are more just than those which place the contracting parties at a disadvantage in the industry. From the viewpoint of the workers, therefore, the open shop is the means whereby a reckless and sometimes prodded minority might effectively hinder the will of the great number of workers in a given industry. Equality of opportunity, treatment and industrial standards, can be achieved only to the extent of equal conditions of employment throughout a given enterprise. Both capital and industry are consequently the ultimate beneficiaries of the closed shop." [155]

To permit unions to permit a union shop agreement in part of an industry, while preventing them from extending that agreement to the entire industry, is to impose upon the employers covered by such an agreement and who are will-

[155] *Labor Disputes and Collective Bargaining*, by Ludwig Teller, Vol. I, Sec. 98, p. 281. Emphasis added.

ing to pay the union rates, an impossible, unjust and discriminatory economic burden, creating a competitive disadvantage detrimental to the union itself and reducing its right to a closed shop to a hollow phrase granting nothing.

The closed shop merely sets up legitimate rules governing hire and tenure of employment at a particular place of business. This it does in order to safeguard the economic status and the human welfare of the workers concerned and the wage-earners generally. The end it pursues is certainly not illegal. In the case of business combinations, operating for private gain, their refusal to deal with others is a common law privilege, so long as it is not exercised to secure an end which is in itself illegal. In the case of a closed shop union, its members do no more than to refuse to work with non-unionists.

Speaking of the unions' control of jobs at a particular plant, Professor Gregory says: "Employees or applicants for employment who are eligible for membership in the union, but are unwilling to join, suffer no more harm than those who are compelled by business combinations either to abide by the rules of the association or to stay out of the field entirely." [156] Even if the unions be unreasonable about entrance requirements, Professor Gregory believes that "it is doubtful if they have ever exercised the ruthless exclusionary pressures which many business combinations, in the name of competition, have been permitted by our courts to practice against enterpreneurs." [157] He concludes his discussion of this point with this significant statement:

> "The unions at least permit applicants for employment to secure jobs by joining their ranks. And the employer who is no longer free to hire nonunion employees, or to retain them as such after a certain num-

[156] *Labor and the Law*, by Charles O. Gregory, New York, 1946, p. 116.
[157] *Ibid.*

ber of days, suffers no more harm than does any of the consumers of goods whose access to markets for such goods is controlled by an effective business combination. He is in a position to get all the labor he wants through the union as long as he meets the union's terms. If the union is not able to supply his needs, he is of course free to hire where he pleases, usually on the understanding that independently hired nonunion employees become members of the union if retained beyond certain time. Naturally all of this deprives the employer of the advantages he might secure from being able to hire help in an unorganized labor market at whatever wage bargains he might be able to drive. But there is no particular reason why an employer should expect under our common law to have a fairly available supply of labor at advantageous terms any more than he should expect thereunder to have uncontrolled access to raw materials." [158]

In view of the fact, that in practice, the terms of compensation of the workers concerned are set by voluntary agreement of the employer and the union, and the procedure for hire of workers is mutually agreed upon, the effect of the closed shop agreement upon the employer is far less restrictive than that of the business combinations with which our industry and trade are permeated. What is more, the restriction on employment of nonunionists imposed by the closed shop is not established for private gain at the expense of others. Such restriction, as we have previously shown, benefits not only the workers immediately concerned, but *all* workers whose wage standard is protected. Business combinations to increase prices are harmful to the community because they serve to *reduce* the purchasing power of the entire community and is harmful to it. A combination of workers to safeguard a fair wage standard of wage-earners *enhances* the purchasing power

[158] Ibid., pp. 116-17.

of the entire community and protects the living standard and the welfare of the whole community. To accord the instrumentality of the closed shop the same status and treatment as to a business monopoly is to disregard all logic and render the public interest a grave disservice.

F. The Closed Shop Itself Is Not the Source of Abuses

Abuses and malfeasance exist under any of our institutions. Activities of seven and a half million persons covered by the closed shop and union shop agreements are no exception. A union officer who misappropriates the funds entrusted to him is just as deserving of a jail term as the president of the New York Stock Exchange. But it is equally idle to argue that embezzlement is fostered by the closed shop as it is to claim that it is peculiar to Wall Street.

Where abuses exist, they are independent of the closed shop operation. In fact the presence of a closed shop may serve to reduce existing abuses. As pointed out by Professor Slichter,

> "The demand that employers do all their hiring through the union office and the union office alone is usually provoked by special conditions. It may be the result of abuses in the labor market. In industries where shops are small and employers do not hire through central employment departments, jobs are often obtained through knowing people in the shop, through pull, and even through bribery. The workers may demand hiring through the union office in the hope that it will remove pull and favoritism." [159]

The closed shop agreement has done much to do away with the abuses of favoritism, kick-back and special deals. It has served to strengthen the degree of union responsibility to its members and to stimulate full membership participation in union affairs. As any other institution,

[159] Slichter, *op. cit.*, p. 83.

unions under a closed shop are not without abuses. The closed shop places no premium and holds no monoply on malfeasance.

Conclusion

We have traced the origin and development of the closed shop and union security as a human institution in modern history and its growth as an American institution on the native soil of our land since the birth of the American Republic. We have reviewed the record of its practical operation and have shown its ability to meet the most searching tests of economic, social and ethical considerations. We have demonstrated that the closed shop and union security are a part and parcel of a private enterprise system operating for profit and that it is indispensable to the welfare of the community under such a system. The closed shop is a bulwark for men who work against privation and want. Without economic security which the closed shop stands to protect, no other freedom can endure.

In the words of a president of one of the largest corporations in America,

> "In the end we must accept one glaring truth: labor unions are here to stay and, whatever our private thoughts on the matter, we are going to have to get along with them if our nation is to prosper. We can fight them and curse them, and legislate against them, and otherwise belabor the surface of the problem to our heart's content; but we know deep down that this superficial attitude is not going to accomplish any constructive results. For our own sake, for our children's sake, for the sake of the nation, and very likely for the sake of a goodly portion of the world, we are going to have to cut right down to the fears and prejudices and pride and ache for security that made people form unions in the first place." [169]

[169] "Labor Relations on a Hard-Boiled Basis," by Charles Luckman (President, Lever Brothers), *Harper's Magazine*, June 1947, p. 515.

APPENDIX A.

Mr. Dooley on the Open Shop

by Peter Finley Dunne

"What's all this that's in the papers about the open shop?" asked Mr. Hennessey.

"Why, don't ye know?" said Mr. Dooley. "Really, I'm surprized at yer ignorance, Hinnissey. What is th' open shop? Sure, 'tis where they kape the doors open to accommodate th' constant stream av min comin in t' take jobs cheaper than th' min what has th' jobs. 'Tis like this, Hinnissey: Suppose wan av these freeborn citizens is workin' in an open shop f'r th' princely wages av wan large iron dollar a day av tin hour. Along comes anither son-av-a-gun and he sez t' th' boss, 'Oi think Oi could handle th' job nicely f'r ninety cints.' 'Sure,' sez th' boss, an th' wan dollar man gets out into th' crool worould t' exercise his inalienable roights as a freeborn American citizen an' scab on some other poor devil. An' so it goes on, Hinnissey. An' who gits th' benefit? Thrue, it saves th' boss money, but he don't care no more f'r money thin he does f'r his right eye.

"It's all principle wid him. He hates t' see men robbed av their indipindence. They must have their indipindence, regardless av anything else."

"But," said Mr. Hennessey, "these open-shop min ye menshun say they are f'r unions if properly conducted."

"Shure," said Mr. Dooley, "if properly conducted. An' there we are: An' how would they have thim conducted? No strikes, no rules, no contracts, no scales, harly iny wages, an' dam few mimbers."

Literary Digest, Nov. 27, 1920.

APPENDIX B

Approximate Number of Workers in Manufacturing in 1946
Covered by Specified Types of Union Security
(In thousands)

Industry	Total[1] Employed	Closed Shop	Union Shop with Preferential Hiring	Union Shop	Maint. of Member.	Total Under Union Security	Percent Under Union Security
Food	1,102	210	130	90	185	615	55.8
Tobacco	85	8	3	15	32	58	68.2
Textiles	1,183	40	120	165	180	505	42.7
Apparel	1,001	515	320	50	8	893	89.2
Lumber	602	25	90	60	76	251	41.6
Furniture	376	20	20	55	70	165	43.9
Paper	361	.....	15	126	70	211	58.4
Printing & Publishing	383	250	.....	.....	.....	250	65.3
Chemicals	472	1	4	60	125	190	40.3
Petroleum	151	.....	5	15	50	70	46.4
Rubber	218	.....	3	30	140	173	79.4
Leather	355	40	61	20	60	181	51.0
Stone, Clay and Glass	390	5	45	75	35	160	41.0
Iron and Steel	1,390	30	40	235	725	1,030	74.1
Non-ferrous Metals	378	30	15	40	185	270	71.4
Electrical Machinery	507	15	25	70	260	370	73.0
Machinery, excluding electrical	1,027	15	15	90	460	580	56.5
Automobiles	699	1	10	240	80	331	47.4
Transportation Equipment	459	55	17	50	250	372	81.0
Miscellaneous	414	15	12	20	40	87	21.0
TOTALS	11,554	1,275	950	1,506	3,031	6,762	58.5

[1] Production Workers.

Source: Industrial Relations Branch, Bureau of Labor Statistics, U. S. Department of Labor.

APPENDIX C

Work Stoppages Due to Closed or Union Shop Disputes Compared with All Work Stoppages 1927–1945

Year	Total	Stoppages Due to Closed or Union Shop Disputes		Idleness from Stoppages Due to Disputes Over Closed or Union Shop as Percent of Idleness from all Work Stoppages
		Number	Percent of Total	
1927	666	43	6.5	0.4
1928	620	63	10.2	2.0
1929	924	91	9.8	4.6
1930	651	59	9.0	4.1
1931	796	52	6.5	1.5
1932	852	45	5.2	0.4
1933	1,673	41	2.5	0.4
1934	1,817	109	6.0	1.3
1935	2,003	151	7.5	4.7
1936	2,156	130	6.0	5.8
1937	4,720	331	7.0	6.8
1938	2,772	318	11.5	9.9
1939	2,639	324	12.3	46.6*
1940	2,493	289	11.6	12.5
1941	4,314	358	8.3	10.4
1942	3,036	330	10.9	15.5
1943	3,734	146	3.9	1.2
1944	4,958	154	3.1	2.6
1945	4,616	216	4.6	4.5
Average, 1927–45	2,392	171	7.2	7.1

*Coal strike over union shop dispute.

Source: *Strikes in the United States, 1880-1936*, by Florence Peterson, Bulletin No. 651, Bureau of Labor Statistics, U. S. Department of Labor. Pp. 61, 62, 65; and 1937–45 Summaries of statistics on work stoppages published by the Bureau of Labor Statistics.

APPENDIX D

Number of Strikes and Strikers Involved By Causes of Disputes 1881–1905

Year	All Causes		Recognition of the Union, Union Rules and Employment of Certain Persons			
			Strikes		Strikers	
	Strikes	Strikers	Number	Percent of Total	Number	Percent of Total
1881	471	101,070	68	14.44	8,428	8.34
1882	454	120,860	63	13.88	8,720	7.21
1883	478	122,198	72	15.06	6,606	13.13
1884	443	117,313	64	14.45	5,136	4.38
1885	645	158,584	109	16.90	14,790	9.32
1886	1,432	407,152	300	20.95	56,314	13.83
1887	1,436	272,776	395	27.52	61,629	22.59
1888	906	103,218	248	27.37	23,261	22.54
1889	1,075	205,068	246	22.89	30,009	14.63
1890	1,833	285,900	438	23.90	45,465	15.91
1891	1,717	245,042	486	28.31	39,863	16.28
1892	1,298	163,499	345	26.57	58,008	35.48
1893	1,305	195,008	327	25.06	48,911	25.08
1894	1,349	505,049	260	19.27	20,736	4.10
1895	1,215	285,742	301	24.78	54,200	18.97
1896	1,026	183,813	372	36.26	49,449	26.90
1897	1,078	332,570	261	24.22	30,903	9.29
1898	1,056	182,067	299	28.32	38,517	21.15
1899	1,797	308,267	603	33.56	75,813	24.59
1900	1,779	399,656	570	32.04	230,890	57.77
1901	2,924	396,280	1,229	42.04	150,027	37.86
1902	3,162	553,143	1,269	40.14	300,422	54.31
1903	3,494	531,682	1,409	40.32	187,056	35.18
1904	2,307	375,754	1,067	46.25	223,963	59.61
1905	2,077	176,337	900	43.33	54,896	31.12

NOTE: During the same period, 1881-1905, a total of 1,546 lockouts were recorded involving 18,547 establishments and 716,231 locked-out employees. Of this total, 774 or almost exactly half involving 288,398 locked-out employees, or *40 percent* of the total, was concerned with the recognition of the union, union rules, or the employment of certain persons. The closed shop as such was not singled out as a specific issue in the disputes causing stoppages. Instead, strikes, and lockouts in which union security was a major issue, were classified under the two headings given here: "recognition of the union and union rules" and "employment of certain persons."

Source: Twenty-first Annual Report of the Commissioner of Labor, 1906, "Strikes and Lockouts." Washington, Government Printing Office, 1907, pp. 56-57, 60-61.

ACKNOWLEDGMENT

In the preparation of this economic brief, numerous authorities, including academic, government, employer and trade-union sources were relied upon. The responsibility for the conclusions drawn from this material is, of course, entirely our own.

A special acknowledgment is due to Rev. Jerome L. Toner, O.S.B., Ph.D., Professor of Industrial Relations at St. Martin's College. Dr. Toner is responsible for the first comprehensive study of the closed shop made by a non-partisan analyst of the problem. The results of his scholarship are embodied in *The Closed Shop* (The American Council on Public Affairs, Washington, D. C., 1942, published in cooperation with the Catholic University of America Press.) In addition to the basic source material presented in this book, Dr. Toner's testimony before Congressional committees and a summary of his forthcoming study of the closed shop in Great Britain were utilized.

Many of the leading students of labor relations in the United States contributed valuable data, especially Dr. Edwin E. Witte of the University of Michigan and Dr. William M. Leiserson, former Chairman of the National Mediation Board. Mr. Herbert Thatcher, Associate Counsel of the American Federation of Labor, provided valuable material and was most helpful in relating economic considerations to the legal aspects of the problem.

Miss Marilyn James and Miss Gertrude Kaplan, both of Antioch College, and Miss Ruth Stephenson and Mrs. Martha G. Scoll, rendered valuable services in the preparation of the manuscript. Mrs. Eloise Giles, Librarian of the American Federation of Labor, was most helpful in securing the source material.

B. S.

APPENDIX E

State Legislation Banning Union-Security Agreements: The Due Process Issue and Judicial Self-Restraint

By

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TEXAS LAW REVIEW

Vol. XXVI November, 1947 No. 1

pp. 47-88

State Legislation Banning Union-Security Agreements: The Due Process Issue and Judicial Self-Restraint

I. The Statutes

Late in 1946, a legal writer stated ". . . it is a common view today that something has to be done about the labor situation . . . the public . . . wants something done about union power."[1] Significantly, this statement was made at the end of a twelve month period during which the country had experienced the greatest strike wave in its history.[2] In response to this common view, state legislators enacted various restrictive labor statutes most publicized of which were those apparently banning all forms of union-security agreements between business managers and their employees.[3] Characterizing it as a "right to work law," Texas legislators at their last session adopted a measure typical in form of all the statutory bans.[4] Con-

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[1]Gregory, *Something Has to Be Done*, *Fortune*, Nov. 1946, p. 132; *cf.* Richberg, *Significant Developments in Labor Law 1941–46*, 14 Geo. Wash. L. Rev. 537 (1946).

[2]See note 156, infra.

[3]Twelve states have enacted such laws: Ariz. Laws 1947, c. 81, 2A CCH Lab. Law Serv. 41201 (1947); Ark. Laws 1947, c. 101, 2A CCH Lab. Law Serv. 41301 (1947); Fla. Const., Decl. of Rights §12 (amended in 1944), 2A CCH Lab. Law Serv. 42105 (1947); Ga. Laws 1947, No. 140, 2A CCH Lab. Law Serv. 42201–2 (1947); Iowa Laws 1947, S. B. 109, 2A CCH Lab. Law Serv. 42903 (1947); Neb. Laws 1947, L. B. 344, 2A CCH Lab. Law Serv. 44402 (1947); N. C. Laws 1947, H. B. 229, 2A CCH Lab. Law Serv. 45201–3 (1947); N. D. Laws 1947, H. B. 151, 2A CCH Lab. Law Serv. 45301 (1947); S. D. Laws 1947, S. B. 224, 2A CCH Lab. Law Serv. 46401 (1947); Tenn. Laws 1947, S. B. 367, 2A CCH Lab. Law Serv. 46501 (1947); Tex. Laws 1947, c. 74, H. B. 23 (Vernon's Sess. Law No. 3, pp. 107–108, 1947), 2A CCH Lab. Law Serv. 46601–2 (1947); Va. Laws 1947, c. 2, 2A CCH Lab. Law Serv. 47001 (1947). The lower courts of three of the above states have recently upheld these statutes as not being in conflict with the state and federal constitutions: American F. of L. v. American Sash and Door Co., 13 CCH Lab. Cases, ¶63995 (Ariz., Super. Ct., Maricopa Co., July 28, 1947); Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 13 CCH Lab. Cases ¶63919 (Neb., Dist. Ct., Lancaster Co., July 7, 1947); Federal Firefighters of Oak Ridge v. Roane-Anderson Co., 12 CCH Lab. Cases ¶63782 (Tenn., Ch., Anderson Co., April 15, 1947). None of the opinions are illumipative as to reasons for not sustaining the charges of the unconstitutionality of the legislation. Also see note 16 *infra*.

[4]Tex. Laws 1947, c. 74, H. B. 23 (Vernon's Sess. Law No. 3, pp. 107–108, 1947), 2A CCH Lab. Law Serv. 46601–2 (1947):

Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively, for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

Section 2. No person shall be denied employment on account of membership or nonmembership in a labor union.

Section 3. Any contract which requires or prescribes that employees or applicants for employment in order to work for an employer shall or shall not be or remain

trasted with this state action was the Taft-Hartley Act which continued the federal policy of sanctioning union-security agreements although circumscribing their form and mode of use.[5] The federal act, however, contained a provision to the effect that its sanction was not to override state policy thus giving the Texas measure new stature.[6] Similarly, almost two-thirds of the states continued their statutory or common-law policy of sanction of the union-security principle.[7]

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members of a labor union, shall be null and void and against public policy. The provisions of this section shall not apply to any contract or contracts heretofore executed but shall apply to any renewal or extension of any existing contract and to any new agreement or contract executed after the effective date of this Act.

Section 4. (Definition of the term "labor union" is given.)

Section 5. (Separability clause.)

Section 6. Due to the fact that there have been widespread labor difficulties resulting from the unreasonable demands of labor unions, all of which has delayed the reconversion plan, and there being an urgent need for constructive legislation to protect the public welfare, which need is so found, there exists an emergency and an imperative public necessity that the Constitutional Rule . . . be suspended . . . and this Act shall become effective from and after its passage, and it is so enacted." (The bill failed to receive the necessary two-thirds vote and did not become effective until September 5, 1947; this emergency clause is quoted for the purpose of indicating the legislative intent.)

[5] 49 STAT. 452 (1935), 29 U. S. C. A. §158(3) (1947), as amended, 29 U. S. C. A. §158(a)(3) (Supp. July, 1947).

[6] 49 STAT. 457 (1935, 29 U. S. C. A. §164 (1947), as amended, 29 U. S. C. A. §164(b) (Supp. July, 1947).

[7] (A) Seventeen states specifically authorize union-security agreements: CAL. LAB. CODE (Deering 1943) §1126; 3 COLO. STATS. ANN. (Michie, Supp. 1946) c. 97, §94(6)(c) (requires three-fourth of employees in a bargaining unit to vote authority for the execution of the agreement); CONN. GEN. STATS. (Supp. 1945) §937h(5); Del. Laws 1947, H. B. 212, §3(a), 2A CCH LAB. LAW SERV. 41905 (1947) (however, an employer can lawfully refuse or agree to execute a union-security agreement); Me. Laws 1947, c. 25, §41-A, as added, c. 395, 2A CCH LAB. LAW SERV. 43301 (1947) (prohibits the closed shop form of union-security agreements but permits the union shop form); MASS. GEN. LAWS (1947) c. 150A, §4, sub§(3), as amended, c. 657, 2A CCH LAB. LAW SERV. 43503-2 (1947); MICH. COMP. LAWS (Mason Cum.Supp. 1940) §8628-14; MINN. STATS. (Mason 1941) §179.12(3); Mo. Laws 1947, S. B. 79, §5; N. H. REV. LAWS (1942) c. 212, §21, as amended, Laws 1947, c. 194, §21, 21-a, 2A CCH LAB. LAW SERV. 44691, 44602 (1947) (requires two-thirds of employees voting to authorize execution of the agreements, but they must be at least a majority of all employees in the bargaining unit); N. J. REV. STATS. (1946) c. 38, as amended, Laws 1947, c. 47 and 75, §34:13B-2, 2A CCH LAB. LAW SERV. 44701, 44702 (1947); N. Y. LABOR LAW art. 20, §764(5); PA. STATS. ANN. (Purdon 1941) §211.6(c); R. I. Pub Laws 1941, c. 1066, §5, sub. §5; UTAH CODE ANN. (1943) §49-1-16(c); WIS. STATS. (1943) §111.06(c) 1, as amended, Laws 1945, c. 424 (requires two-thirds of employees voting to authorize execution of the agreement, but they must be at least a majority of all employees in the bargaining unit; Ala. Acts 943, No. 298, §8, p. 256 (this law was at first interpreted by the state attorney general as proscribing union-security agreements, *see Opinion of Attorney General, Nov. 20, 1943*, 2A CCH LAB. LAW SERV. 41001-2; but the Alabama Supreme Court has recently held that it proscribes only those agreements

, With emphasis on the Texas measure, analysis of the state statutes banning union-security agreements is here attempted from the standpoint of the due process issue. For a proper approach, certain preliminary matters must be considered: (1) a statement of the purposes of the legislation, (2) a definition of terms, (3) a general

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achieved through force and intimidation while permitting all other agreements. Hotel and Restaurant Employees Int'l Alliance and Bartenders League of America v. Greenwood, 30 So.2d 696 (Ala.Sup. 1947).

(B) Twenty-five states, exclusive of those listed in note 3 *supra* and including twelve of those specifically authorizing union security agreements by legislation, have enacted anti-injunction statutes more or less similar to the Norris LaGuardia Act, 47 STAT. 70 *et seq.* (1932), 29 U. S. C. A. §101 *et seq.* (1947). These statutes have been interpreted to prohibit the issuance of injunctions against the use by unions of one or more types of peaceful economic pressures in varying situations for the obtaining of union security agreements. Thus, an indirect sanction has been given by these statutes to the agreements themselves. *See, e.g.*, Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414 (1940); Perry Truck Lines v. Int'l Brotherhood of Teamsters, 106 Colo. 25, 101 P.2d 436 (1940); Loew's Enterprises v. Int'l Alliance of Theatrical Stage Employees, 127 Conn. 415, 17 A.2d 525 (1941); Boise Street Car Co. v. Van Avery, 61 Ida. 502, 103 P.2d 1107 (1940); Schuster v. Int'l Ass'n of Machinists, 293 Ill.App. 177, 12 N.E.2d 50 (1937); Baton Rouge Building Trades Council v. James and Co., 201 La. 749, 10 So.2d 606 (1942); Northwestern Hospital v. Public Building Service Employees' Union Local No. 113, 208 Minn. 389, 294 N.W. 215 (1940); Newark Milk and Cream Co. v. Milk Drivers and Dairy Employees, Local No. 680, 19 N.J.M. 468, 19 A.2d 232 (1941); Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E.2d 910 (1937); DeWilde v. Scranton Building Trades and Construction Council, 343 Pa. 224, 22 A.2d 897 (1941); Kimbel v. Lumber Union, 189 Wash. 416, 65 P.2d 1066 (1937); American Furniture Co. v. International B. of T. C. and H. of A., 222 Wis. 338, 268 N.W. 250 (1936). Also *see*, Notes, 106 A.L.R. 362 (1937), 120 A.L.R. 316, 326 (1939), 124 A.L.R. 751, 756 (1940), 127 A.L.R. 868, 873 (1940), 138 A.L.R. 287 (1942). Some state courts have held that the right of workers to use one or more peaceful economic pressures for the obtaining of union security agreements has a constitutional basis apart from the anti-injunction statute of the state. *See, e.g.*, Retail Clerks Union, Local No. 1460 v. Peaker, 222 Ind. 209, 51 N.E.2d 628 (1943); Twichell Champlin Co. v. Conary, 11 CCH Lab. Cases ¶63483 (Me., Super. Ct., 1946); Blanford v. Press Publishing Co., 286 Ky. 657, 151 S.W.2d 440 (1941); other state courts, which have not yet passed on the issue of whether an anti-injunction statute permits the use of economic pressures by workers for the obtaining of union security agreements, have given a common law sanction to such use of the pressures. *See, e.g.*, Int'l Pocketbook Workers Union v. Orlove, 158 Md. 496, 148 Atl. 826 (1930); Iverson v. Difno, 44 Mont. 270, 119 Pac. 719 (1911). Some state courts, which have not passed on the above issue, have recognized union security agreements as enforceable at common law. *See, e.g.*, Swart v. Huston, 154 Kan. 182, 117 P.2d 576 (1941); Key v. Breece Lumber Co., 45 N.M. 397, 115 P.2d 622 (1941); Roddy v. United Mine Workers of America, 41 Okla. 621, 139 Pac. 126 (1914). Some state courts which have held that the use of economic pressures by workers for obtaining a union security agreement is not a labor dispute within the meaning of an anti-injunction statute under all or some circumstances, nevertheless recognize the validity of the agreement when executed. *See, e.g.*, Markham and Callow v. Int'l Woodworkers of America, 170 Ore. 517, 135 P.2d 727, 745 (1943); Fashioncraft v. Halpern, 313 Mass. 385, 388, 48 N.E.2d 1, 3-4 (1943); Marvel Baking Co. v. Teamsters Local Union No.

analysis of the possible coverage of the statute, (4) a determination of the possible tests of constitutionality applicable, a consideration of the presumption of constitutionality in relation to a factual approach to the due process issue.

II. Purposes

The author of the Texas statute circulated among the members of the legislature a statement in explanation of the proposed measure which is significant in determining its purposes.[8] These, he indicated, were correlative in nature: (1) the protection of the right of every person to work without respect to membership in a labor union, and (2) the prevention of the creation of monopolies by virtue of union-security agreements. The statute's emergency clause expresses a related purpose: (3) the prevention of "widespread labor difficulties resulting from the unreasonable demands of labor unions. . . ." As expressed by a business executive before a United States Senate committee, the ultimate objective in banning union-security agreements is the cutting down of union power in labor-management relations.[9]

III. Definition of Terms

Since a fundamental change has been effected by the statutes in the collective bargaining process, it is well to state the basic elements of the process. Collective bargaining is a process of negotiation or

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524, 5 Wash.2d 346, 105 P.2d 46 (1940). The courts of some states having neither of the two types of statutes mentioned above have nevertheless recognized at common law either union-security agreements, or pressures for obtaining them, or both. *See, e.g.*, Mississippi Theaters Corp. v. Hattiesburg Local Union No. 615, 174 Miss. 439, 164 So. 887 (1936); Ritter v. Milk and Ice Cream Drivers and Dairy Employees Union, Local No. 336, 136 Ohio St. 582, 27 N.E.2d 406 (1940); Johnson v. American Railway Express Co., 163 S.C. 191, 161 S.E. 473 (1931); Blossom Dairy Co. v. Int'l Brotherhood of Teamsters, 125 W.Va. 165, 23 S.E.2d 645 (1942). The courts of many of the states having these two types of statutes had before their passage already sanctioned union-security agreements at common law. *See* Note, 95 A.L.R. 10, 18 (1935); Despres, *The Collective Agreement for the Union Shop*, 7 U. of Chi. L. Rev. 24 (1939).

[8] Bell, *Statement and Explanation of . . . "The Right to Work Measures"* . . . (mimeographed, undated). The purpose of the bill was said to be to protect ". . . the inalienable right of every man and woman to work . . . without respect to membership or non-membership in a labor organization. The need for such . . . act is the general recognition . . . that closed shop contracts . . . are being used to create monopolies and special privileges in respect to the right to work. . . . Section 26 of Art. I of the Constitution of Texas declares: 'Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . . .' The . . . law will make this declaration in our Texas Bill of Rights more specific."

[9] Wilson, *Legislation for Labor Peace*, p. 19, 23 (1947) (reprint of testimony given before the United States Senate Committee on Labor and Public Welfare, Feb. 5, 1947); also *see* 9 N.A.M. Law Dig. 17, 32 (1946).

competition between a business manager and a representative of his employees with the objective of formulating a satisfactory agreement or conventional equivalent upon wages, hours, and other basic conditions of employment.[10] Such process includes not only the exchange of views across a conference table but also the possible exertion by employees of economic pressures such as strikes, boycotts, and picketing as well as similar pressures by business managers.[11] Agreements resulting from this competitive process are generally described as union-security agreements when they contain a provision requiring union membership by a worker as a condition precedent to his getting employment or remaining in the employment of the business manager who is a party to the agreement.[12] In some instances, a union-security arrangement may take the form of a convention or custom. The forms of agreements or conventions are characterized by the type of shop in which union membership is prescribed:[13] (A) closed shop, (B) union shop, (C) maintenance of union membership shop, (D) percentage shop, and (E) preferential shop. The first three mentioned are the most prevalent forms of union-security arrangements with approximately 75 per cent of the 15,000,000 union workers now covered by them.[14] The closed and union shop forms of the agreement bear a substantial similarity to each other. The basic difference between the two forms is that the closed shop agreement requires the business manager to hire only members of the union executing the agreement, while the union shop agreement leaves the business manager free to hire either from union or nonunion ranks. In the latter case, where a nonunion worker is employed, he must become a member of the union executing the agreement within a designated time from the inception of the agreement or the employment whichever is later. Thus, the closed shop agreement sets up the requirement that an applicant for work must be a member of a union as a condition precedent to employment, while the union shop agreement sets up the requirement that an applicant for work, if not a member of a union, must become a member as a condition precedent to con-

[10] *See* for a general treatment: TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS (1942).

[11] Gregory, *The Enforcement of Collective Labor Agreements by Arbitration*, 13 U. OF CH. L. REV. 445, 451 (1946).

[12] 9 N.A.M. LAW DIG. 32 (1946); 54 AM. FEDERATIONIST 6-7 (1947); Marquardt, *Extent of Collective Bargaining and Union Recognition, 1946*, 64 MONTHLY LAB. REV. 765, 767 (U.S. Dep't of Labor, 1947) (the U.S. Dep't of Labor uses the phrase "agreements for union status" to describe this type of collective bargaining agreement).

[13] TONER, THE CLOSED SHOP 16-37 (1942) (contains an excellent analysis of the five main forms of these agreements).

[14] Marquardt, *op. cit. supra* note 12 at 767 (48 per cent of the 31,000,000 workers in industries in which unions function or seek to function are covered by collective bargaining agreements. Thirty three per cent of the 14,800,000 so covered in 1946 had closed shop agreements, 17 per cent had union shop agreements, and 2 per cent had maintenance of membership agreements).

tinued employment. The maintenance of union membership form of agreement requires that an employee or applicant for work who is a member of the union executing the agreement must maintain his membership in this union during the life of the agreement and while in the employment of the business manager who is party to the agreement. No definition of the last two forms is given here because these forms are less frequently used and are found in special situations in particular localities.

To be distinguished carefully from union-security agreements is what has been labelled the closed union. The former relates to a contractual or conventional relationship between a business manager and his employees, while the latter refers to an unreasonable membership policy on the part of a union. The closed shop form of union-security agreement and the closed union relate, therefore, to entirely different subject matters although the two may co-exist as later discussed. The closed union is defined here as a labor union which has closed its membership to a worker either by imposition of unreasonable entrance requirements or by arbitrary expulsion of such worker from the union without just cause.[15]

IV. Coverage of the Statute

In the recent case of *American Federation of Labor v. Watson*,[16] the Supreme Court held that it would not consider the constitutionality of a Florida constitutional amendment apparently banning union-security agreements until the courts of that state had given it an authoritative construction. The question arises, therefore, as to what construction the Texas courts will likely give the statute banning union-security agreements, if and when it is challenged. Only a broad approach to the question is attempted here. Of course, construction is primarily a mode of getting at the intent of the legislature with the object, if possible, of finding a construction which will save the statute if its constitutionality is in doubt in any respect.

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[15] *See* Newman, *The Closed Union and the Right to Work*, 43 Col. L. Rev. 42 (1943); Note, 160 A.L.R. 918 (1946); James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329 (1944).

[16] 327 U.S. 582 (1946) reversing 60 F.Supp. 1010 (S.D.Fla. 1945) with which compare State v. Dade County Roofing Co., 156 Fla. 260, 22 So.2d 793 (1945). (The lower court in the *Watson* case, *supra*, denied an injunction against enforcement of the state constitutional amendment holding that the union security agreements of the plaintiffs, labor unions and employers, were prohibited by the provision which was not a denial of due process or in conflict with the National Labor Relations Act. The Supreme Court in reversing the lower court held that while the complaint stated a good cause of action based on an allegation of irreparable injury due to the threatened upsetting of a collective bargaining system, it was error to have decided the case on its merits before the Florida courts had construed the amendment. Mr. Justice Murphy insisted in his dissent (327 U.S. 582 at 606-607 (1946)) that the due process issue was raised on the face of the amendment and that the Court should not evade a clear cut decision on the merits simply because a highly controversial matter was involved.)

The courts will look to the plain meaning of the words, to the legislative history, to the statutory setting, to legislation *in pari materia*, to the policy behind the statute, and to the possibility of reenactment of judicial or administrative decisions. We may with certainty delimit four matters which the Texas courts may consider: (A) the types of union-security agreements proscribed by the statute, (B) the class of labor-management relationships covered, (C) the extension of the proscription declared by the statute against union-security agreements to the use by employees of traditional economic pressures for obtaining the conditions provided for in such agreements, and (D) the remedies available for violations of the statute and the persons to whom such remedies may accrue.

It seems fairly certain that section three[17] of the Texas statute proscribes all the forms of union-security agreements described earlier. This section refers to "any" contract which contains a provision requiring union membership as a condition precedent to a worker's obtaining employment or remaining in the employment of a business manager. Agreements for closed, union, and maintenance of membership shops expressly contain such a provision. Agreements for a percentage or a preferential shop by requiring the business manager to hire a certain percentage of union members or to prefer them under certain conditions over nonunion workers in effect reach the same result as the first three forms of the agreements. Under certain conditions the latter two agreements require the business manager to hire only union workers or to discharge nonunion workers. No exception is made in section three other than for those agreements executed before the effective date of the statute. The statement of the author of the bill[18] indicates that closed shop agreements are the special target of the statute but it also employs language which shows that "any" form of union-security agreements was intended to be prohibited. Further, effective enforcement of the policy of the act would be impossible if any of the five main forms of the agreements were not proscribed as any one of them could be utilized successfully by labor unions to eliminate competition with nonunion workers.

Whether the act was intended to cover union-security agreements falling under the National Labor Relations Act or was only intended to include those outside the act is not indicated either by the terms of the Texas statute or by the available legislative history. Considerations of policy, however, would seem to point to a defeat of the purposes of the act if it relates only to those labor-management relationships not covered by the federal act. If the National Labor Relations Board exercises its jurisdiction to the widest possible extent the great majority of state businesses which execute such agreements do a sufficient interstate business or their transactions sufficiently affect

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[17] See note 4 *supra*.
[18] See note 8 *supra*.

interstate commerce to place them under the federal act.[19] Should the Texas statute not extend to such agreements, a large number of Texas employees will not be protected in their "inherent right" to work "without respect to membership . . . in a labor organization."[20] Further, the "widespread labor difficulties"[21] sought to be prevented by the act logically include those major disputes occurring in Texas industries covered by the federal act. In the *Watson* case, the lower court held the similar Florida amendment included agreements executed by parties coming under the jurisdiction of the National Labor Relations Board.[22] Finally, there is no barrier, unless there is a constitutional one, from the standpoint of conflict with federal law, to motivate the state courts to restrict the coverage of the act as the amended National Labor Relations Act authorizes the state to apply its public policy relative to union-security agreements to those businesses otherwise covered by such act.[23]

Whether the public policy declared by the first three sections of the Texas statute against union-security agreements and any denial of the right of a worker to obtain or retain employment because of nonmembership in a union will be extended to a proscription of the use by employees of economic pressures to obtain the same results without agreements is a more difficult question. The fair implication from the plain words of the first two sections[24] is that the use of such pressures to force a business manager not to employ or to discharge a nonunion worker would constitute a violation of the act as it would constitute a denial of employment on account of nonmembership in a labor union. It is also unlikely that a state court would interpret the public policy declared by the statute to proscribe the end-product of peaceful negotiations and not construe it to proscribe the use of strikes, boycotts, and picketing to achieve the same results without agreements. Such a construction would invariably lead to a defeat of the policy of the act. Other courts, in the absence of legislation, have usually either approved or proscribed both the agreements and economic pressures for union-security.[25] Where legislation has sanctioned the agreements, the courts have almost unanimously held that use of one or more economic pressures for obtaining them was permissible.[26] It seems likely, therefore, that state courts will declare the public policy established by the statute also requires a proscrip-

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[19] *See, e.g.*, Loveman, Joseph and Loeb v. N. L. R. B., 146 F.2d 769 (C.C.A. 5th 1945) and Airline Bus Co., 64 NLRB 620 (1945).

[20] See note 4 *supra*.

[21] *Ibid.*

[22] See note 16 *supra*.

[23] See note 6 *supra*.

[24] See note 4 *supra*.

[25] *See* Despres, *The Collective Agreement for the Union Shop*, 7 U. of Chi. L. Rev. 24 (1939); also see note 15 *supra*.

[26] See note 7 *supra*.

tion of economic pressures for the securing of union-security agreements or of equivalent conventional conditions of employment.

The statute is silent as to remedies available for violations of it and as to whom such remedies will accrue. Since the question is not pertinent to the due process issue here, a brief reference is made in the footnote to the possible positions the courts may take on the matter.[27]

V. The Test of Constitutionality: The Presumption of Constitutionality in Relation to a Factual Approach to the Due Process Issue.

Assuming that a minimum construction by the state courts of the statute will include what has just been outlined, the Supreme Court faces a "horse of a different color." Telescoped into one statute are deprivations of at least three claims likely to be asserted by the affected parties in a challenge of the statute: (A) the claim of a right by a business manager to make a union-security agreement,[28] (B) the claim of a right by employees to join in such agreement through their joint representative, and (C) the claim of a right by employees to utilize their traditional pressures for the purpose of obtaining such agreements or their conventional equivalents from business managers. Such diversity of claims of rights will make it necessary for the Court to classify them as "economic" or "personal" in nature[29] and, consequently, to subject the statute either to one or both of the tests of constitutionality historically applied. To complicate matters further, the doctrine of congressional consent[30] will enter the picture by virtue of the amended National Labor Relations Act which authorizes the states to apply whatever policy relative to union-security agreements

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[27](A) An individual worker might be accorded a cause of action against either an employer or a labor union or both where they have violated the act, either for injunctive relief or for damages, (B) the state may be allowed to proceed against corporations to oust them of their charters for having violated the act, (C) the state may be permitted to enjoin violations by employers or labor unions or both, (D) an employer may be accorded injunctive relief against labor unions exerting economic pressures to compel him to do an act in violation of the statute, (E) an employer may be allowed to rescind agreements executed before the effective date of the law, and (F) a labor union or individual employee or worker may be accorded injunctive relief or damages where an employer denies employment to a person because of his union membership.

[28]Such a right was asserted before the lower court in the *Watson* case, see note 17 *supra*, but in view of the primary purpose of the Texas statute, *see* §II *supra* and §V (B) *infra*, this comment concerns itself with the other two possible claims of rights.

[29]The Supreme Court does not refer in terms to a right-classification device as most claims of right fall readily under what have been termed "economic" or "personal" rights. However, in the labor cases, the Supreme Court has clearly been concerned in classifying the economic pressure privileges of workers as one or the other of these rights. See notes 40 and 49 *infra*.

[30]See sub §D *infra*.

they desire in the field of interstate commerce. Further, since the influx of new members under the Roosevelt administration, the Court has pursued a policy of judicial self-restraint unparalleled during its entire existence.[31] Not only has the due process clause been practically eliminated as a bar to state legislation in the economic field, and the negative aspect of the commerce clause considerably narrowed; but the federal power to regulate commerce has also been given a far-reaching interpretation. Logically, this policy of judicial self-restraint which has supported "social" legislation should also support "restrictive" legislation as such policy assumes the legislature, rather than the Court, is a more competent agent in the social and economic field. Undoubtedly predicating his remark on such a background, a leading labor law authority observed that he could perceive no ground on which state legislation banning union-security agreements could be declared unconstitutional.[32]

The due process clause may be dead so far as it may be a device by which the Court will overturn legislation in the economic field. Yet it is interesting to discover in 1947 the substantial and discordant note sounded in the *Kotch* case[33] which involved, however, the equal protection clause. Reminiscent of *Smith v. Texas*,[34] the case concerned a Louisiana statute regulating pilotage in the Mississippi River. This statute required a pilot seeking a license, no matter how qualified, to serve a six months' apprenticeship under an incumbent pilot before being ready for certification by the pilot board to the governor for appointment. As administered by the pilot board, the statute confined appointment to relatives of the present pilots so as to make for a sort of nepotism and to prevent the plaintiff, a highly qualified pilot with years of experience, from obtaining an appointment. Justice Black, speaking for the five judge majority, took great pains to emphasize the unique character of the subject-matter as well as its regulation by the state since 1805 and held the admittedly discriminatory practice under the statute was not the kind of discrimination which violated the equal protection clause. Speaking for the normally most liberal section of the Court in economic matters, Justice Rutledge stated the statute was invalid on its face as a wholly arbitrary exercise of state power because the qualification test for pilots was said to be no test at all.[35] Although the decision has no controlling force outside its context, the dissent indicates a conception of a limit beyond which a state cannot go under its regulatory power over economic matters despite the present policy of judicial self-restraint. Had the issue before the Court been that of due process, it is doubtful that the dissent would have reached a different result.

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[31] *See* Braden, *Umpire to the Federal System*, 10 U. OF CHI. L. REV. 27 (1942).
[32] GREGORY, LABOR AND THE LAW 115 (1946).
[33] Kotch v. Board of River Port Pilots, 67 S.Ct. 910 (1947).
[34] 233 U.S. 630 (1914).
[35] 67 S.Ct. 910 at 916, 917 (1947).

There are, however, more substantial indications that the present Court may embark on a new policy relative to state legislation which it regards as "restrictive" rather than as "social." It has been frequently observed that the Court has pursued several decisional trends favorable to workers. The upholding and subsequent liberal interpretation of the National Labor Relations Act and other acts affecting labor favorably, while part of a judicial self-restraint program, were also consistent with possible conceptions of the members of the Court relative to fundamental rights of workers.[36] Further, the refusal of the Court to find such an interference with interstate commerce in the *Apex* sit-down strike case[37] as constituted a restraint of trade under the Sherman Act, and the subsequent refusal to permit the invocation of criminal sanctions against the union in the *Hutcheson* jurisdictional dispute-boycott case[38] continued the second decisional trend favorable to workers. The reasoning of Mr. Justice Frankfurter in the latter case by which he transposed sections 4 and 13 of the Norris-LaGuardia Act into section 20 of the Clayton Act reflected a conception that fairness demanded a suspension of criminal sanctions against labor unions where they engaged in activities not subject to being enjoined, even if Congress had not contemplated such a result.[39] A third line of authority beginning with the *Thornhill* case[40] lifted peaceful picketing to the dignity of free speech although the doctrine was limited somewhat in the later cases. The possible greater significance of this group of cases will be later examined. To be compared with these trends is the case of *United States v. United Mine Workers of America*.[40a] The exceptional circumstances and narrow issues involved in this case, however, would seem to preclude its decision from representing a reversal of the attitude of the Court evidenced in the earlier labor cases. These three decisional trends indicate, at the least, that the Court which adopted a policy of judicial self-restraint toward legislation in favor of workers has also acted affirmatively to protect workers where legislation, federal or state, was sought to be invoked in restriction of the rights or privileges of workers. If and when it is faced with the recent restrictive legislation relative to labor, the Court may seek to protect what it conceives to be fundamental rights of workers and "the objective of any national labor organization" as it was put by Mr. Justice Stone.[41] What devices may be utilized, the mode of their activation, and the probable effect of their use upon the congressional consent doctrine is discussed here-after.

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[36] Dodd, *The Supreme Court and Organized Labor*, 1941-1945, 58 HARV. L. REV. 1018-1070 (1945).

[37] Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

[38] United States v. Hutcheson, 312 U.S. 219 (1941).

[39] See Gregory, *op. cit. supra* note 32 at 269-277.

[40] Thornhill v. Alabama, 310 U.S. 88 (1940); also, see note 49 *infra*.

[40a] 67 S.Ct. 677 (1947).

[41] Apex Hosiery Co. v. Leader, 310 U.S. 469 at 503 (1940).

The Supreme Court has applied two tests in determining, from the standpoint of due process, the constitutionality of state legislation which extends no further than the field of possible state interest. Where the restriction or deprivation is of an "economic" claim of right relating to the use of property or to the making of contracts, the Court utilizes a "test of reasonableness." It is said that ". . . due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained."[42] Where the restriction or deprivation is of a "personal" claim of right, the Court applies a "clear and present danger test." With reference to the freedom of speech and of the press, it is said that "abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[43] If the Court applies the "test of reasonableness" to a state statute challenged as a denial of due process, a presumption of constitutionality attaches to the statute. Chief Justice Hughes once stated that it ". . . is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption."[44] But today, according to *Madden v. Kentucky*,[45] where the "test of reasonableness" is applicable, ". . . the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Formerly, the establishment of but one irrational basis of the legislation was sufficient to shift the burden to the proponent of justifying the legislative deprivation, as was shown by the *Decatur* case[46] in 1935. On the other hand, if the Court applies the "clear and present danger test" to the challenged statute, no presumption of constitutionality attaches to the statute and the proponent of the measure assumes a burden of showing the existence of a clear danger of substantive evils justifying the state action.

Functionally, the Court device in the due process cases of classifying rights as "personal" or "economic" in nature has served as an evaluation of the right by the Court and as a placing of an almost insurmountable burden of proof as against a presumption of constitutionality or its contrary. Thus, if the present Court desires to protect what it may conceive to be the fundamental rights of workers, there are at least two approaches it may make under the right-classification device. First, it may continue the device unchanged with its concomitant burdens of proof. In so doing, it might deter-

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[42]Nebbia v. New York, 291 U.S. 502, 525 (1934).

[43]Thornhill v. Alabama, 310 U.S. 88, 104–105 (1940); also *see* Schenck v. United States, 249 U.S. 47, 52 (1919).

[44]Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 209 (1934).

[45]309 U.S. 83, 88 (1940) (due process and equal protection).

[46]Georgia Railway and Electric Co. v. Decatur, 295 U.S. 165 (1935); also *see* Note, 36 Col. L. Rev. 283 (1936).

mine the right of workers to use economic pressures in obtaining conventional arrangements for union-security to be "personal" in nature. Constitutional protection of this economic pressure privilege would seem to call for an invalidation of a state policy directed toward preventing any requirement, however made, that a worker must join a union in order to get employment. If the invalidation of the state policy in this respect were to be made, then the Court should logically extend the economic pressure privilege to include its use for obtaining union-security agreements as they require the same condition of union membership for employment as do the conventional arrangements. If such an extension were to be made, the Court would next seem required for the sake of consistency to hold the making of union-security agreements to be a constitutional right of workers as the agreements are the end-products of the exertion of the protected pressures. It would be difficult, however, for the Court to classify the contract-making privilege of workers as "personal," for contract rights have been treated by the Court as "economic" in nature. If, however, such right is really "economic" then an unchanged right-classification device would require the application of the "test of reasonableness" with its pitfalls for the challenger under the burden of proof.

Another method is open to the Court. It might modify the right-classification device as regards the burden of proof where "restrictive" labor legislation is before the Court. In so doing, the Court could recognize the right of workers to use economic pressures for obtaining union-security agreements and conventions as "personal" in nature. Then, recognizing a right in workers to make a union-security agreement to be "economic" in nature, the Court might modify its attitude toward the presumption of constitutionality of "restrictive" legislation and permit something less than a complete negativing of every conceivable basis supporting it to overturn the presumption. While the Court would probably not return to the position taken in the *Decatur* case, it might invent a rule of "substantial negation." Under such a rule, if the challenger could show enough irrational bases for the legislation, the presumption would be held overturned. This modification of the presumption could be justified on the basis that the "personal" rights of workers are so closely allied to their "economic" rights as to require special treatment of the latter under the presumption.[47] If this modification were to be made, the significance of the factual approach[48] to the due process issue would be revived

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[47]The frequent statement is found in the cases that the right of collective bargaining is protected by the Fourteenth Amendment with the distinction made that the contract aspect of this right is intimately related to the economic pressure aspect. *See, e.g.*, Stapleton v. Mitchell, 60 F.Supp. 51, 61 (D.Kan., 1945), *app. dism'd by stipulation*, 326 U.S. 690 (1943).

[48]*See* Note, *The Consideration of Facts in "Due Process" Cases*, 30 COL. L. REV. 360 (1930); Brown, *Due Process, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 960–968 (1927).

and the "Brandeis brief" would become a near essential in presenting facts to the Court of which it might take judicial notice. Something resembling these two approaches will have to be taken by the Court if it intends to protect what it may conceive to be the worker's fundamental rights.

Should the Court make the first approach, it might elevate the economic pressures of the strike and the boycott to the dignity of free speech similarly to its elevation of peaceful picketing in the *Thornhill* case. The decisions following this case have inferentially recognized picketing to be an economic pressure as well as a form of speech,[49] but while they have modified the original doctrine somewhat, they continue to protect peaceful picketing, in extensive situations, as free speech. Although strikes and boycotts in their narrowest sense do not constitute informational pressures,[50] they are functionally almost inseparable from peaceful picketing in that they are concurrently utilized to force the business manager, who is subjected to them, into an agreement relating to union-security or to other terms of employment. Consistently with its position in the picketing cases, the Court could extend constitutional protection under the Fourteenth Amendment to strikes and boycotts utilized for obtaining union-security conventions and agreements within the area of allowable economic conflict established for peaceful picketing. If the Court felt this device too cumbersome for giving protection to the fundamental rights of workers, it might utilize the Thirteenth Amendment to give a constitutional basis to the rights to strike or to engage in a secondary labor boycott for purposes inclusive of obtaining union-security arrangements.[51] This amendment has, of course, been held to protect the right of an individual to leave his employment.[52] In addition, a federal district court in *United States v. Petrillo*[53] utilized this amendment as a basis for holding unconstitutional the new section 506 of the Communications Act (added in 1946)[54] on the ground that the act, as sought to be enforced in a criminal information, seriously interfered with the right of workers to strike which was guaranteed by the amendment. The Supreme Court reversed the trial court's dismissal of the information on the ground, *inter alia*, that the act did not *on its face* violate the amendment as the act contained no specific prohibition of the right of workers to strike.[55] In pointing out that the information was subject to amendment so as

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[49] See the concurring opinion of Mr. Justice Douglas in Bakery and Pastry Drivers Union v. Wohl, 315 U.S. 769, 776 (1942); also *see* Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722, 727-728 (1942).

[50] Gregory, *op. cit. supra* note 32 at 350-363.

[51] Note, *The Reach of the Thirteenth Amendment*, 47 Col. L. Rev. 299 (1947).

[52] Arthur v. Oakes, 63 Fed. 310 (C.C.A. 7th 1894); also *see* Pollock v. Williams, 322 U.S. 4 (1944).

[53] 68 F. Supp. 847, 849 (N.D. Ill. 1946).

[54] 60 Stat. 89 (1946), 47 U.S.C.A. 506 (Supp. 1946).

[55] United States v. Petrillo, 67 Sup.Ct. 1538 (1947).

to avoid constitutional questions arising from an attempted application of the act through a criminal prosecution, the Court significantly added, however, ". . . whether some possible application of it (the act) to particular persons in particular sets of circumstances would violate the Thirteenth Amendment is a question we shall not pass upon until it is appropriately presented."[36] The statement is inconclusive, but it indicates a possible reserve power available to the Court for protecting what it may conceive to be the fundamental rights of workers.

The infrequency of litigation under the Thirteenth Amendment emphasizes a well-known fact that the right to strike for various purposes has been generally recognized or accepted as a fundamental right. With the wave of restrictive labor legislation on the books, the Thirteenth and Fourteenth Amendments may take on new significance. However, once the Court determined that a statutory deprivation as opposed to mere regulation is of a "personal" right, the normal result would be a decision holding the challenged statute to be unconstitutional. This would be true because of the difficulty which the proponent faces in establishing a clear and present danger justifying the state action. Since the Texas statute and those similar to it work a total deprivation rather than a mere regulation of the claims of rights affected, it seems that a classification by the Court of the contract or economic pressure privileges of workers as "personal" rights would result in the statutes being declared unconstitutional. Such a result would, of course, require the Court to hold that Congress cannot consent to a state applying legislation to the interstate commerce field which denies workers these rights.[37] If the contract-making right is left outside the protected fold, the Court would reach an inconsistent position and allow a fundamental tool to be lost to workers. If it is included, the Court will find it difficult to justify as a "personal" right.

For facilitating the presentation of material which may be in the background of the judicial mind, the writer assumes that the Court will make the second approach if it seeks to write a national labor policy into the Constitution, *i.e.*, the classification of the economic pressure privilege as a "personal" right and the contract-making privilege as an "economic" right with an accompanying modification of the burden of proof under the "test of reasonableness." Whatever device is used, assuming the Court does undertake to protect the fundamental rights of workers as it conceives of them, the important thing to get at is the material or facts of which the Court may take judicial notice in reaching its result. The device is but secondary.

The remainder of this comment is divided into four parts. Three subsidiary due process issues naturally arising under the "test of reasonableness" will be considered: (A) is the result of the depriva-

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[36] *Id.* at 1544.
[37] *See* sub §D *infra*.

tion reasonable, (B) will the purported conditions, sought to be corrected, be eliminated to any degree, and (C) assuming the existence of the purported conditions and the necessity for some corrective legislation, is the total deprivation of the rights affected, as opposed to regulation thereof, necessary? Finally, the effect upon the congressional consent doctrine will be considered in the event that the Court does determine that the claims asserted are fundamental rights of workers.

A. Is the Result of the Deprivation Reasonable?

The result of the deprivation of asserted rights effected by the statutes banning pressures and agreements for union-security will likely be examined by the Court from the standpoint of the relation of business and labor to our economic structure. Numerous private and government studies indicate that during the past seventy years this structure has been undergoing a transition from a primarily competitive to an increasingly non-competitive form of organization.[35] Such a conclusion refers to a condition in many areas of economic activity whereby the individual producers and vendors have ceased to follow classical conceptions of competition by substituting cooperative behavior and various techniques in their stead. The proposition does not mean that competition between separate interest groups has decreased, as in fact such competition has increased due to en-

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[35] (1) Arnold, The Bottlenecks of Business (1940).
(2) Bennett, The American Patent System (1943).
(3) Berge, Cartels (1944).
(4) Berle and Means, The Modern Corporation and Private Property (1933).
(5) Brown and others, Industrial Wage Rates, Labor Costs, and Price Policies (TNEC Monograph 5, 1940).
(6) Burns, Decline of Competition (1936).
(7) Compilation of Studies, The Basing Point Problem (TNEC Monograph 42, 1941).
(8) Cover and others, Problems of Small Business (TNEC Monograph 17, 1941).
(9) Federal Trade Commission:
a. Price Bases Inquiry (1932).
b. Open-price Trade Associatons (1929).
(10) Galbraith, *Monopoly Power and Price Rigidities*, 50 Q. J. Econ. 456 (1936).
(11) Hamilton and Till, Antitrust in Action (TNEC Monograph 16, 1941).
(12) Kahn, *Fundamental Deficiencies of the American Patent Law*, 30 Am. Econ. Rev. 475 (1940).
(13) Lyman, Legal Phases of Cooperative Associations (1929).
(14) National Resources Committee, Structure of the American Economy (1939).
(15) Pearce, Trade Association Survey (TNEC Monograph 18, 1941).
(16) Smaller War Plants Corporation, Economic Concentration and World War II, Report to the Special Committee to Study Problems of American Small Business, Sen. Comm. Print No. 6, 79 Cong., 2d Sess. (1946).
(17) Wilcox, Competition and Monopoly in American Industry (TNEC Monograph 21, 1941).

hanced group bargaining power. This non-competitive condition within separate areas extends to many business, agricultural, and labor groups. It is primarily evidenced by private and public policies looking to the control of prices and production in the broadest sense of these terms. The purposes of such controls are the same for each of the three types of producers or vendors, namely, the collective security of the individual units or members of the group, an increased bargaining power for the group as against other groups, and the best possible return for goods and services sold.[59] There still remain extensive areas of economic activity where active competition between members of a particular group continues on the whole. Among such groups are certain agricultural producers and distributors; industries such as lumber, coal, petroleum production, and fisheries; manufacturing industries such as cotton textiles, woolen goods, rayon, knitted goods, clothing, shoes, household appliances, and certain food products; wholesale and retail distributors; service trades; and the bulk of the laboring classes.[60] Even in many of these groups there are substantial indications[61] of the cooperative behavior which has become characteristic of the great majority of industries, several types of agricultural producers and distributors, and many labor groups. Detailed explanation of the economic factors which underlie the change which has taken place is beyond the scope of this comment.[62] Only a general treatment of the present status of the non-competitive trend is attempted so as to permit a showing of the relation of the ban on union-security agreements to the trend which may bear on the question of reasonableness of the statutes.

The most authoritative study made of this non-competitive condition among business units is that by the Temporary National Economic Committee,[63] which was established pursuant to a resolution of the Seventy-fifth Congress. It covers exhaustively the period between 1920 and 1940 and confirms the conclusions which had been reached in numerous private investigations in previous years. Besides the monographs of the TNEC, the various investigations of the Federal Trade Commission on the same subject are primary source materials.[64] All these studies present compelling evidence that the policies of business managers have been increasingly directed toward the establishment of non-competitive markets in goods as between members of a particular trade or industry. These policies consist of price and production controls which make for a uniformity of prices and the regulation or elimination of price competition. Two factors, *inter alia*,

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[59] WILCOX, *op. cit. supra* note 58(17) at 215–298; BURNS, *op. cit. supra* note 58(6) at 22; TOSDAL, *op. cit. supra* note 13 at 148–175.

[60] WILCOX, *op. cit. supra* note 58(17) at 19–63.

[61] WILCOX, *op. cit. supra* note 58(17) at 280–292; COVER AND OTHERS, *op. cit. supra* note 58(8) at 159-203.

[62] BURNS, *op. cit. supra* note 58(6) at 1–42.

[63] *Op. cit. supra* note 58(5, 7, 8, 11, 15, and 17).

[64] FTC, *op. cit. supra* note 58(9) a and b.

have made possible these controls: cooperative or joint action by business units, large and small, within a trade or industry, and concentration of control of price and production into a few dominant business units within most industries. These two factors represent a conception by business managers that extended price competition is shortsighted economics and a potentially dangerous business policy which prevents a stable economy and the greatest possible realization of profits.[65] By maintaining relatively uniform and inflexible prices through price and production controls they seek to permit all or most firms in the particular group to realize some profit and the more efficient to obtain greater profits.

Agriculture, long the stronghold of a system of competition between large numbers of small-scale producers, also evidences the trend. Farmers early in this century recognized their small individual bargaining power in the national markets and failure thereby to obtain what they conceived to be an adequate share of the national income. To remedy this situation, they formed cooperative marketing associations for centralized control over sales and in many instances over production of particular agricultural products.[66] Such associations functioned to eliminate competition between farmers who agreed to turn over their crops for a certain period of time to the central agency which could dispose of the products at times and prices deemed best for the group. The result of such an arrangement was a collective bargaining power far surpassing that of the individual farmer. The legislative sanction of such associations and the eventual substitution of state control for group efforts is treated at another point.

Workers in the various trades have long recognized, similarly, their lack of individual bargaining power for obtaining an adequate share of the national income and better conditions of employment.[67] Their efforts toward achieving a collective bargaining power preceded by many decades the beginning of the non-competitive trend in our economic structure. Development of the factory system through bringing laborers into towns promoted their earliest efforts in joint self-help activities. They gravitated to small local unions which established by-laws binding the members not to work for business managers who employed nonunion laborers. Such activity is traceable to colonial days but first became effective during the early 1800's. In America, as in England, these activities for collective security were proscribed by the courts as criminal conspiracies, a doctrine which began to die out after the decision in *Commonwealth v. Hunt*[68] in 1842. The area of permissible economic activity accorded by courts to unions, however, was narrow during the last half of the nineteenth century as

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[65] Pearce, *op. cit. supra* note 58(15) at 346 and 352.

[66] United States Dep't Agric., Farmers' Cooperative Associations in the United States (Circular 94, 1929); White, Cooperative Marketing of Farm Products in the U. S. (1937).

[67] Toner, *op. cit. supra* note 13 at 58–92.

[68] 4 Mete. 111 (Mass. 1842).

a result of the application of a theory of competition. This common-law conception of competition justified the infliction of economic harm on others by one in the pursuit of self-interest provided the means utilized violated no established category of tort or crime.[69] American and English courts, however, applied this doctrine so as to proscribe most of the normal competitive activities of present-day unions while permitting business managers to utilize techniques against their competitors closely resembling those denied to unions. Mr. Justice Frankfurter, before coming to the bench, made a classic analysis of the labor injunction[70] which was the primary tool between 1880 and 1932 by which this double standard was given effect.

Growth of nation-wide industries after 1880, however, stimulated the unification of small local unions into national organizations and an increase in membership by 1905 to approximately 2,000,000 workers.[71] Union members fixed upon the objective of eliminating competition between workers in particular trades and industries, not only in single shops but in all shops.[72] It was felt that the collective security of the whole group, an equality of bargaining power, and an adequate share of the national income could only be obtained through efforts looking to the establishment of non-competitive markets for labor. These efforts took the form of strikes and boycotts, as implemented by picketing, and were utilized for extending union organization into nonunion industrial plants and trades. The end in view was the making of union-security agreements or their conventional equivalents with business managers whereby only those workers would be hired who were or promised to become union members. Mr. Justice Stone, in speaking of this objective in the *Apex* case, stated that ". . . in order to render a labor combination effective it must eliminate the competition from nonunion-made goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization."[73]

Starting with the evidence that large areas of economic activity now present a picture of mutual efforts toward collective security through the regulation or elimination of price competition, it is next necessary to compare the modes utilized by business managers and employees for attaining their economic objectives and for consolidating their resultant economic gains. It is then necessary to consider the relationship of non-competitive markets in goods and in labor so established to the question of competition between the members of these two major groups.

Business managers and their employees utilize three techniques in seeking to establish uniformity of prices—the one of goods and the other of labor: influence pressures, economic pressures, and consolida-

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[69] Gregory, *op. cit. supra* note 32 at 17–82.
[70] Frankfurter and Greene, The Labor Injunction (1930).
[71] Wolman, Growth of American Trade Unions, 1890–1923 (1925).
[72] Toner, *op. cit. supra* note 13 at 58–92; Gregory, *op. cit. supra* note 32 at 217.
[73] Apex Hosiery Co. v. Leader, 310 U.S. 469 at 503 (1940).

tion measures. An influence pressure refers to that activity by which either group seeks to persuade the members within the group to follow certain price and production policies. Economic pressures refer to those activities by either group which seek to enforce such policies when influence pressures prove inadequate. Consolidation measures refer to control techniques by which either group attempts to protect a beneficial position gained through the use of these pressures or other activities.

The TNEC and the FTC studies indicate that business managers utilize five main types of influence pressures for bringing about price uniformity and regulation of price competition: (A) price leadership by major or patentee corporations,[74] (B) price stabilization measures such as seasonal price setting,[75] (C) delivered price systems based on zones or basing-points,[76] (D) non-price competitive measures such as advertising, quality, and service competition,[77] (E) trade association activities including cost education, statistical activities relative to production, price reporting systems, standardization programs relative to products, terms of contracts, and price differentials. Detailed analyses of each of these forms of influence pressures, the extensiveness of their use, and substantial success in regulating price competition are available.[78]

While each pressure complements the others, the most significant of them are the trade association activities. The National Industrial Recovery Act by providing for rigid price and production control through the agency of trade associations recognized their efficacy before that time in achieving such controls without legislative sanction. Since the demise of the NIRA, the trade association movement has continued to grow until today there are in excess of 8,000 of them with some 2,000 having a national scope. They have been defined as associations "of independent enterprises in the same or similar branches of industry formed for the purpose of increasing the profits of its members by subjecting their competitive activities to some form of common control"[79] The arrangement or agreement by which individual enterprises become part of the association tends toward a substitution of common for independent policies in the determination of price and production. By the candid admission of trade association officials and business managers, this common agency is fundamentally similar to the labor union in that it aims at the collective

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[74] WILCOX, *op. cit. supra* note 58(17) at 121–132; BURNS, *op. cit. supra* note 58(6) at 76–145.

[75] BURNS, *op. cit. supra* note 58(6) at 195–272.

[76] COMPILATION OF STUDIES, *op. cit. supra* note 58(7) at 31–39; WILCOX, *op. cit. supra* 58(17) at 146–158; BURNS, *op. cit. supra* note 58(6) at 273–371; comment, *Basing Point Pricing and Anti Trust Policy*, 55 YALE L. J. 558 (1946); FTC, *op. cit. supra* note 58(9)(a); N.Y. *Times*, Aug. 24, 1947, 43, p. 1, col. 8.

[77] BURNS, *op. cit. supra* note 58(6) at 372–417.

[78] PEARCE, *op. cit. supra* note 58(15) at 45–300; WILCOX, *op. cit. supra* note 58(17) at 215–298; BURNS, *op. cit. supra* note 58(6) at 43–75.

[79] WILCOX, *op. cit. supra* note 58(17) at 215 and 259.

security of the members of the group through the elimination or control of ruinous price competition.[80]

In addition to influence pressures, business managers employ when necessary a still greater range of economic pressures to deal with individual business units which do not join in the common policies for price and production control. Among the scores of pressures and combinations thereof commonly used are the following: (A) reductions of price below that set by a non-complying unit, (B) reduction of a base price under a basing-point delivered price system by a firm whose price will adversely affect the non-complying unit,[81] (C) change of the basing-point to the locality of the non-complying unit,[82] (D) patent infringement suits by patentee corporations against holders of similar patents who maintain lower prices for the same type of products,[83] (E) withdrawal of licenses to patents from license holders who do not join in price and production controls,[84] (F) boycott of producers selling to non-complying units,[85] (G) establishment of large differentials between prices of raw materials and finished products by integrated corporations so as to bring into line either producers of raw materials or producers of finished products who fail to coöperate properly in common price policies.[86] It has been established that the influence pressures readily blend into economic pressures when utilized by trade associations. The TNEC compiled a list of several hundreds of these groups in 135 trades, in which it appeared from the evidence that a trade association was exercising some form of actual control over production, price, and terms of sale in national or regional markets.[87]

Once a business has gained a profitable position in an industry or trade, its business managers naturally seek to protect the corporate position and to provide for a situation in which long-term profits

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[80] STEVENSON, THE WAY OUT (Stevenson, Jordan, and Harrison, N.Y.) 25, 30–31. The author was a member of a management firm directing the activities of 30 national trade associations. He referred to two fetishes which were to be overcome in the trades: "First, the belief that competition is the life of trade. Second, the belief that the individual has the fundamental right to engage in trade in whatever form or manner he desires . . . organization of the industry must carry with it compulsory membership on the part of every firm engaged in the industry and must give to a sufficiently large majority, let us say 66⅔ per cent of the capital invested in the industry, the right to control the operations of the industry and to compel the adherence of the minority to the will of the majority."

[81] FTC, PRICE BASES INQUIRY, 84–85 (1932).

[82] *Id.* at 125, 130.

[83] ARNOLD, *op. cit. supra* note 58(1) at 173–181; BENNETT, *op. cit. supra* note 58(2) at 104–105; BERGE, *op. cit. supra* note 58(3) at 45–46.

[84] BENNETT, *op. cit. supra* note 58(2) at 82–104.

[85] ARNOLD, *op. cit. supra* note 58(1) at 36, 40; WILCOX, *op. cit. supra* note 58(17) 257–258.

[86] BURNS, *op. cit. supra* note 58(6) at 441–445; WILCOX, *op. cit. supra* note 58(17) 70–71, 166.

[87] WILCOX, *op. cit. supra* note 58(17) at 280–293.

will be realized."[87a] The protective devices used for this purpose are designated consolidative measures. Among such devices are the following: (A) sharing the market by businesses through agreements or conventions,[88] (B) price agreements or their conventional equivalents,[89] (C) interlocking directorates and similar devices of a direct or indirect nature for common control of corporations in the same field,[90] (D) pooling of patents by patentee corporations and licensing agreements,[91] (E) vertical and other similar types of integration of industrial facilities,[92] (F) actual elimination of competitors by use of economic pressures,[93] and (G) merger of separate corporations in an industry or trade.[94] The first four consolidative measures represent a concentration of control over price and production policy by agreement, while the last three measures represent concentration of control by bringing greater amounts of the total production in one or more industries into one corporation. Legislative[95] and judicial sanction has been given to the most important of these consolidative measures. The Supreme Court, in recognizing the validity of integration,[96] pooling of patents,[97] and merger,[98] interpreted the Sherman Act with regard to underlying and perhaps inevitable economic forces.

The above analysis has been made for the purpose of showing the foundation upon which competition between business managers and their employees rests in vast areas of economic activity. As indicated by the TNEC monographs and other investigations, price and production control which has been achieved in the great bulk of our indus-

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[87a] *See* ARISTOTLE, ETHICA NICOMACHEA BOOK I, 1098a (either Chase transl., Everyman's, 1934; or Ross transl., Oxford) (the principle involved is very old: ". . . for as it is not one swallow or one fine day that makes a spring, so it is not one day or a short time that makes a man blessed and happy."

[88] BURNS, *op. cit. supra* note 58(6) at 146–194; WILCOX, *op. cit. supra* note 58(17) at 176–189.

[89] WILCOX, *op. cit. supra* note 58(17) at 132–146; also *see*, Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

[90] WILCOX, *op. cit. supra* note 58(17) at 189–194; NRC, *op. cit. supra* note 58(14) at Part I, c. 9, appendix 12.

[91] BERGE, *op. cit. supra* note 58(3) at 52–191; BENNETT, *op. cit. supra* note 58(2) at 80–100; BURNS, *op. cit. supra* note 58(6) at 11–17; Kahn, *op. cit. supra* note 58(12) at 487–488; Toulmin, *Patent Pools and Cross Licenses*, 22 VA. L. REV. 119 (1935).

[92] BURNS, *op. cit. supra* note 58(6) at 418–461.

[93] See notes 81–86 *supra*.

[94] BURNS, *op. cit. supra* note 58(6) at 16, 18, 20, 145, 356; WILCOX, *op. cit. supra* note 58(17) at 113–121; SMALLER WAR PLANTS CORP., *op. cit. supra* note 58(16) at 61–64; Levi, *The Antitrust Laws and Monopoly*, 14 U. OF CHI. L. REV. 153–183 (1947).

[95] 38 STAT. 732–48 (1914), as amended, 15 U. S. C. A. §19 (1941) (this statute sanctions indirect interlocks by prohibiting only direct ones between competing organizations in the same field); also see note 90 *supra*.

[96] United States v. United Shoe Machinery Co., 247 U.S. 32 (1918).

[97] Standard Oil Co. of Indiana v. United States, 283 U.S. 163 (1931).

[98] Thatcher Manufacturing Co. v. F. T. C., 272 U.S. 554 (1926).

tries and in growing numbers of the smaller trades, is directly related to the labor policies of such businesses.[99] In depression as well as normal economic periods, the achievement of price uniformity and inflexibility depends, *inter alia*, on the adjustment of the volume of production to the available market. The joint correlation of these two factors by business managers becomes particularly evident in depression periods. Quite naturally, businessmen seek to maintain profits and prices in such times, but they can only do so by reducing costs and volume of production which in turn involves a reduction of the number of employees and of wage rates. The role of labor costs is of strategic importance in such periods since they frequently are the only element of cost within the control of the individual producer which can make a difference in profits. As pointed out by Justice Jackson prior to his appointment to the bench: "... if rigid prices meant stability of employment in the industry, we would find price control (by business managers) more tolerable. But generally, the more rigid and inflexible the price of a product during the depression, the more calamitous was the decline of its labor's payroll ..."[100] Joint or coöperative action by business managers in this process of maintaining or cushioning the loss of profits clearly indicates the position of both organized and unorganized employees. Where strong unions and union-security agreements are in effect in an industry, organized employees play a fundamental role in forestalling wage decreases and in bringing about increases thus functioning to counteract a deflationary trend.[101] In the absence of union-security agreements where wage competition between union and nonunion employees is strongest, the business manager can more easily effect wage cuts and increase the hours of work. The joint correlation between price and production policies on the one hand and labor policies on the other is evidenced by the growth since 1930 of labor relations as a major activity of trade associations.[102] In many instances, these associations execute nation-wide or regional collective bargaining agreements with labor unions and so make for uniformity in labor policy among the individual members of the group.

The above analysis has also been made to allow a comparison of the bargaining tools available to business and labor for the purpose

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[99] BROWN AND OTHERS, *op. cit. supra* note 58(5) at xiii-xxv, 103, 127; Means, *Industrial Prices and Their Relative Inflexibility*, SEN. DOC. No. 13, 74th Cong., 1st Sess. (1935).

[100] Jackson, *Should Anti-trust Laws Be Revised?* 71 U. S. L. REV. 575, 578-579 (1937). "Pay rolls for the iron and steel industries declined about 75 per cent while the wholesale price of ingots declined only 16 per cent. The depression prices of cast iron pipe declined 7 per cent and pay rolls declined 74 per cent. While agricultural implements declined 14 per cent in price, that industry's pay rolls took the prize, decline of 83 per cent. Virgin aluminum went down 21 per cent in price and pay rolls of aluminum manufacturers declined about 70 per cent. Cement declined 13 per cent and its pay rolls 72 per cent."

[101] BROWN AND OTHERS, *op. cit. supra* note 58(5) at xvii.

[102] PEARCE, *op. cit. supra* note 58(15) at 325-333, 474.

of showing the ultimate effect of the statutory ban on union-security agreements. The influence pressures of organized employees must be exerted against two groups, unorganized employees and business managers; while those of business managers need only in most instances be brought to bear on other members of the same group. On the one hand, unions attempt to sell themselves to workers and on the other they seek to negotiate collective bargaining agreements with businesses. The success of the union in selling itself to workers is directly related to its success in negotiating with business managers for the improvement of conditions of employment. While many agreements or conventions result from negotiation with industries in which unions have been established for many years, resort ultimately must be made to economic pressures to bring about agreements when negotiation fails to bring about the desired result. By way of contrast, business managers are required to resort to economic pressures against members of their group much less frequently. In comparison with the scores of economic pressures available to business managers in regulating price competition in goods, employees must rely today on but two main economic pressures, the strike and the picket, in regulating price competition with nonunion workers. Although business managers can maintain their pressures over indefinite periods with growing success, strike and picketing activities must of necessity be limited in duration because union members possess relatively small staying power. Even the large national unions, which have greater resources, seek to avoid long and costly pressure activities by effecting compromises rather than carry on futilely. Further, while only picketing has received, under certain circumstances, clear recognition as a constitutional right of workers,[103] the great bulk of pressures and consolidative techniques of business managers have been sanctioned or tolerated by courts and legislatures.[104]

The secondary boycott has been proscribed by most courts and legislatures;[105] although the proscription was temporarily lifted in the federal arena as a result of the *Hutcheson* case, the Taft-Hartley Act in large part restores the condition obtaining before that case.[106] Strikes have received more liberal treatment in the courts which have divided them into permissible and non-permissible types according to an illegal purpose doctrine.[107] Approval was early given to strikes for higher wages, shorter hours, and other immediate conditions of employment. However, strikes directed toward the establishment of union-security conditions were originally declared illegal under the common-law of most states. By the 1930's a substantial number of the states had modified their common-law so as to permit such

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[103]See notes 40 and 49 *supra*.

[104]BURNS, *op. cit. supra* note 58(6) at 2, 9, 13, 17, 21, 428.

[105]GREGORY, *op. cit. supra* note 32 at 132–137.

[106]49 STAT. 452 (1935), 29 U. S. C. A. 158 (1946), as amended, 29 U. S. C. A. 158(b)(4) (Supp. July, 1947); N.Y. *Times*, May 25, 1947, 44, p. 8, col. 5.

[107]GREGORY, *op. cit. supra* note 32 at 105–120.

strikes,[108] but in the federal arena the Supreme Court completed a circle with the *Coronado* decisions by which all union pressures for establishing union-security conditions in nonunion plans were, in practical effect, made offenses under the Sherman Act.[109] Thus the antitrust laws, which had been originally designed to maintain competition between business units,[110] did not prevent concentration of production and non-competitive behavior in large areas of economic activity,[111] but by way of contrast were utilized to maintain a competitive system between union and nonunion employees.

As shown by the situations in the *Duplex*[112] and *Hitchman*[113] cases, unions resorted to these organizational pressures against nonunion businesses through necessity. In the former case, where three of four corporations occupying an industrial field were unionized, their business managers indicated they would withdraw from union-security arrangements unless the union concluded a similar arrangement with the remaining corporation. Otherwise, the three unionized businesses were placed at a disadvantage because the fourth corporation could sell its products for less and make greater profits due to the wage differential. This attempt by unions to place all business units in an industry on the same footing so far as labor policy is concerned led Mr. Justice Holmes to observe in *Paine Lumber Co. v. Neal*[114] that such union effort had "no tendency to produce monopoly of manufacture . . . : since the more successful it is the more competitors are introduced into the trade."

Beginning with the Norris-LaGuardia Act[115] in 1932 and the National Labor Relations Act[116] in 1935, Congress reversed twenty-five years of a judicial labor policy under the Sherman and Clayton Acts which had begun with the *Danbury Hatter's* case[117] in 1908. On

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[108]Newman, *The Closed Union and the Right to Work*, 43 COL. L. REV. 42, 43 (1943); Despres, *The Collective Agreement for the Union Shop*, 7 U. OF CHI. L. REV. 24 (1939).

[109]United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344 (1922) and Coronado Coal Co. v. United Mine Workers of America, 268 U.S. 295 (1925). The secondary consumption boycott had been proscribed in Loewe v. Lawler, 208 U.S. 274 (1908), the secondary labor boycott in Duplex Printing Press Co. v. Deering 254 U.S. 443 (1921), stranger picketing in American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 (1921); and in the last *Coronado* case, *supra*, a strike for union-security conditions where it could be shown there was a subjective intent on the part of union leaders to prevent products of the struck plant from entering interstate commerce.

[110]HAMILTON AND TILL, *op. cit. supra* note 58(11) at 5–11.

[111]BURNS, *op. cit. supra* note 58(6) at 40–41.

[112]See note 109 *supra*.

[113]Hitchman Coal Co. v. Mitchell, 245 U.S. 229 (1917).

[114]Paine Lumber Co. v. Neal, 244 U.S. 459 at 471 (1917).

[115]47 STAT. 70–73 (1932), 29 U. S. C. A. §§101–115 (1947).

[116]49 STAT. 449 *et seq.* (1935), 29 U. S. C. A. §151 *et seq.* (1947), as amended, 29 U. S. C. A. §151 *et seq.* (Supp. July, 1947).

[117]Loewe v. Lawler, 208 U.S. 274 (1908).

the one hand, federal courts were prohibited from issuing injunctions against the use by employees of certain described economic pressures and on the other an affirmative sanction was given to the principle of union-security. With most states[118] following the lead of the federal government, strikes, as implemented by picketing, became the only two permissible pressures to be utilized by employees in their efforts to establish non-competitive markets for labor through union-security arrangements.

Similarly to business managers, employees wish to consolidate their economic gains of higher wages, shorter hours, and other immediate conditions of employment obtained through exertion of pressures and through negotiation. In comparison with the seven major consolidative techniques available to business managers, employees have been permitted to use but one consolidative measure, viz., union-security conventions or agreements.[119] An alternative mode of consolidation is state control such as was accomplished by the Railway Labor Act,[120] but neither business managers nor employees have seriously urged an extension of the policy beyond public utilities. Employees conceive such a system unworkable beyond its present application and business managers do not desire a situation where capitulation to union demands is the order of the day.[121]

Union-security arrangements have had a long American history.[122] For over a century such an arrangement has existed in the printing trades. Other industries have accorded them to their employees for over fifty years. Union-security agreements received judicial sanction earlier than pressures utilized in obtaining them because of the high regard of the courts for contracts. The National Labor Relations Act now extends this sanction to the bulk of business firms in the country with perhaps not more than twenty-five per cent of all firms outside its scope and to these the sanction has been extended by most legislatures.[123] These sanctions indicate, at the minimum, that no other practicable mode of consolidation of economic gains by employees exists under present conditions. On analysis, this conclusion seems justified.

Reference has been made earlier to the necessity of unionization of all business units in an industry or trade if the union expects to maintain its position in the field. The principle is more easily examined in the single shop where employees have concluded a collective bargaining agreement relative to hours, wages, and other immediate

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[118] See note 7 *supra*.

[119] See notes 10 and 108 *supra*.

[120] 48 STAT. 1185 (1934), 45 U. S. C. A. §151 *et seq.* (Supp. 1938).

[121] TONER, *op. cit. supra* note 13 at 93–114.

[122] See note 10 *supra*; TONER, *op. cit. supra* note 13 at 58–92; Am. Federation of Labor, Weekly Supplement, Mar. 21, 1947, p. 1; N.Y. *Times*, Aug. 17, 1947, 81 p. 16, col. 2.

[123] See notes 5 and 7 *supra*.

conditions.[124] Where the business manager remains able to employ nonunion workers under such an agreement without the necessity of their being or becoming members of the union making the agreement, various studies indicate that the manager is likely to replace union employees with nonunion workers as a result of the normal labor turnover or of depressed economic conditions. If this replacement occurs, the union will lose bargaining power and the business manager will eventually be in a position to refrain successfully from further agreements. An intense wage competition naturally sets in between union and nonunion employees which the business manager promotes and of which he takes advantage when it is in his interest to do so. Recognition of union-security agreements as being the only practicable mode by which employees can obtain an adequate share of the national income and maintain a high labor standard within an industry or trade may be found in most state and federal reports, and in numerous government and private studies. Before coming to the Court Mr. Justice Frankfurter, somewhat along the lines pursued by Mr. Justice Holmes in *Paine Lumber Co. v. Neal*, said that ". . . the right of combination by workers [for, *inter alia*, union-security] is in itself a corollary to the dogma of free competition, as a means of equalizing the factors that determine bargaining power. . . ."[125]

The result of the statutes banning union-security arrangements can now be seen in its proper economic perspective. Business managers retain scores of pressures and seven major consolidative techniques for regulating price and production policies, which policies are directly related to the question of competition between business managers and their employees. On the other hand, the statutes deprive employees of their one consolidative technique and seriously impair their two available pressure techniques which they utilize for effective competition with business managers in gaining an adequate share of the national income and better conditions of employment. Their ability to compete is lessened while that of business managers is directly increased. No substitute for maintaining an equality of bargaining power is provided by the statutes or other statutes such as for compulsory arbitration or a form of state control such as has been accorded to railway employees. No distinction is drawn in the statute between agreements which are made with non-competitive industries and trades and those which are made with more competitive business units. Privileges are denied to employees which they have increasingly exercised over a period of one hundred years and which have been sanctioned by the great majority of the states as well as by the federal government. The Court might find, on balancing the interests of the parties to the labor-management relationship, that the scales weigh heavily and unreasonably on the side of management as a result of the deprivation.

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[124] Note, *The All Union Shop in the Courts*, 6 Int'l Jurid. Ass'n Bull. 147, 154-158 (1938); Gregory, *op. cit. supra* note 32 at 119-120.

[125] Frankfurter and Greene, *op. cit. supra* note 70 at 30.

If the Court determines to protect, as fundamental rights, the privileges of workers to make union-security agreements and to utilize pressures for that purpose, the Court is likely, irrespective of the approach made, to take judicial notice of material similar to that which has just been presented.

On the other hand, proponents of these statutes can point to other interests of the state in justification of the deprivation. Their case is strong and will be presented under the analysis of the second issue.

B. Will the Purported Conditions, Sought to Be Corrected, Be Eliminated to Any Degree?

As pointed out earlier, the state statutes banning union-security agreements have for their purpose the correction of certain conditions purportedly caused by such agreements and economic pressures which accompany them: monopoly, abuse of the rights of individual employees, abuse of the rights of business managers, and labor-management conflicts. The historic court criterion in determining this second subsidiary due process issue, part of the "test of reasonableness," is whether the means employed by the statute bear a reasonable relation to the ends sought to be accomplished. Functionally, this part of the test means that if the Supreme Court finds that the elimination of bona fide abuses purposed by the statute will likely be accomplished to any degree, the Court will uphold the statute. As indicated earlier, if the Court determines to protect fundamental rights of workers as it conceives of them, it must modify the present burden of proof as against the presumption of constitutionality under the "test of reasonableness." It might permit something like a rule of "substantial negation" to suffice whereby the challenger of the legislation would be permitted to show enough irrational bases for the measure to overturn the presumption. Otherwise, under the present attitude of the Court toward economic and social legislation, the statute banning union-security agreements should logically withstand any challenge. Assuming such a modification is made, two lines of inquiry are suggested in analyzing this second issue: (A) do the purported conditions or abuses, sought to be corrected, in fact exist in any cognizable aspect, and (B) will the means adopted eliminate, to any degree, the conditions found to exist?

While it is clear that prevention of monopoly is one of the purposes of the statute, it is not so clear in just what sense the term has been used by those indicting union-security agreements. The available material indicates that the monopoly charge has been used in two senses: (A) that any union-security agreement is itself the creation of a monopoly by organized employees, and (B) that union-security agreements are monopolies when combined with a closed union. As used by the Supreme Court, monopoly refers to that degree of concentration of control over prices or production in a corporation the continuance of which the Court is unwilling to permit under the

antitrust laws because of the power to fix prices in a market for goods it vests in the corporation.[126] When the term is used to describe the co-existence of a union-security agreement with a closed union, the use is not accurate, although justifiable by analogy, because of the similarity between a market in goods closed to business managers outside the monopoly and markets in labor absolutely closed to workers outside the union. Nevertheless, although union-security agreements are admitted by all to have for their purpose the elimination of competition of a certain form, they do not in their primary aspect and usual application make for a control over a market in goods.[127] Further, the restraint of competition so accomplished is not by producers of goods. For these reasons whatever union-security agreements accomplish, they do not effect a monopoly. If monopoly in the legal sense was intended to be eliminated, the statutes banning union-security agreements on their face lack one rational basis because they adopt means which are not related in any degree to the prevention of monopolies. It is apparent, however, that the statutes have for their purpose the prevention of "something other than monopoly" which the legislators and others termed monopoly. This purpose would seem to be the elimination of conditions or abuses resulting from union-security agreements or their coexistence with other factors. It is better, therefore, to recognize that union-security agreements look to a looser control of a different sort of a market than to treat them as creating a monopoly and then to justify state power to ban them on the basis of the abuses which are said to follow from the agreements.

The purported abuses associated with union-security agreements fall into two groups: (A) those which are said to follow from the mere existence of the agreements, without more, and (B) those which are said to follow by virtue of the existence of certain pressures and other factors with the agreements. Under the first group fall the purported abuses (1) of the right of individual workers to get employment, and (2) of the right of business managers to obtain workers. Abuses included within the second groups are (1) the exertion of pressures for obtaining or maintaining a union-security agreement so as to cause widespread labor-management disputes, (2) the making of unreasonable demands by labor unions once they have secured power under the agreements, and (3) the acceleration of the evils of closed unions.

That union-security agreements, without more, restrict both the rights of individual workers and of business managers cannot be denied because such agreements have for their purpose and when enforced accomplish the elimination of nonunion labor competition. The nonunion worker can get or retain employment only by joining the union and the business manager can hire only those workers who are or who promise to become union members. Under some forms of

[126] American Tobacco Co. v. United States, 221 U.S. 106 (1911).
[127] Gregory, *op. cit. supra* note 32 at 267.

union-security agreements, the business manager must discharge an employee who does not maintain his union membership or a non-union employee where the conditions are such that a union employee must be preferred. These are all restrictions, but the question is, however, whether the Court is willing to recognize such a situation to be an abuse at all or an abuse which the state can declare intolerable. The question is really whether the establishment of a non-competitive labor market by organized employees is justifiable competition by them with business managers and with individual unorganized workers.[128] This question assumes the co-existence of no other factor with the union-security agreement and that entrance into the union is available to all workers on a reasonable and non-discriminatory basis.

Treatment of the question must necessarily be factual. All that was said under the analysis of the first issue is relevant to the resolution of this question, for it examines the necessity of union-security agreements as a mode of competition by organized employees with nonunion workers and business managers. Added to this approach must be a consideration of the many exceptions to previously required competitive behavior which have been made by the legislatures and courts in favor of those groups deemed to require special protective treatment, for this examines the possibility of discrimination against organized employees as a result of the statutory ban and therefore the reasonableness of the purported abuse as justifiable competition. Within these excepted groups thought to require special protection fall certain business managers, farmers, and workers.

The most obvious legislative exception to competitive behavior in favor of business managers are the patent laws which courts have long recognized as creating legal monopolies.[129] "A patent is essentially a reward for a business man. The prospective monopoly over a trade, the exclusive right to start a business free of competition, is obviously a pecuniary expedient."[130] The grant of patents is postulated on the belief by legislators that an incentive must be given the inventor to develop and disclose new ideas by assuring him economic returns from the invention, and by giving him sufficient time to build an organization which will survive the period of protection from competition. It is assumed that the patentee is not a self-sufficient bargaining unit and that there will be an equality of bargaining power and a return to freedom of competition on expiration of the patent. The correctness of these assumptions, the abuses of the patent system, and its conflict with the antitrust laws are beyond the scope of this comment. It is sufficient to recognize a similarity between some of the reasons given in support of the patent system and the claim of organized employees of needed protection for an equality of bargain-

[128] Compare GREGORY, *op. cit. supra* note 32 at 81–82.

[129] Eastern Wine Corp. v. Winslow Warren Ltd., 137 F.2d 955, 957 (C.C.A.2d 1943), *cert. denied*, 320 U.S. 758 (1943).

[130] Kahn, *op. cit. supra* note 58(12) at 477–478.

ing power with business managers through the use of union-security agreements.

In the *United States Steel Co.*[131] and *International Harvester Co.*[132] cases, the Supreme Court gave currency to the doctrine that "mere size" is not an offense under the Sherman Act.[133] Most authorities agree that as a result of these decisions impetus was given to the second merger movement of the present century.[134] These decisions, together with the decisions which sanctioned non-competitive behavior such as in the *Appalachian Coals* case,[135] represent exceptions made to previously required competitive behavior on the part of business managers under the Sherman Act because of underlying and perhaps inevitable economic forces.

The Fair Trade Laws[136] of the 45 states as supplemented by the Miller-Tydings Act,[137] the Unfair Practices Acts,[138] and Price Discrimination Acts[139] represent channels taken by legislators before and after the invalidation of the National Industrial Recovery Act. All of them seek to regulate price competition among business men and to eliminate what is considered to be unfair or ruinous competition.

Competition between business men is also restrained in any field where the legislature requires certificates of public convenience and necessity as a condition precedent to entry into the business so regulated. Almost all the states now require such certificates to be obtained by intrastate truckers[140] and the Motor Carrier Act of 1935[141] initiated the same requirement by the federal government in interstate commerce. Among other purposes of the legislation are the stability of rates, limitation of the number of firms in the industry, and maintenance of rates higher than would be the case under active competition. The first and third purposes above differ in no substantial respect from similar objectives of organized employees when they execute union-security agreements.

Another exception to competitive behavior among business men was effected by the Webb-Pomerene Act[142] of 1918 which exempted producers for the export trade from the antitrust acts. They were

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[131] United States v. U. S. Steel Corp., 251 U.S. 417 (1920).

[132] United States v. International Harvester Co., 274 U.S. 693 (1927).

[133] United States v. U. S. Steel Corp., 251 U.S. 417, 451 (1920).

[134] BURNS, *op. cit. supra* note 58(6) at 17–21; LEVI, *op. cit. supra* note 94 at 169.

[135] Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

[136] *See, e.g.*, Okla. Stats. 1941, tit. 15, §591 *et seq.*; WILCOX, *op. cit. supra* note note 58(8) at 196–199.

[137] 50 STAT. 693 (1937), 15 U. S. C. A. §1 (1941).

[138] *See, e.g.*, KAN. GEN. STAT. (Corrick, Supp. 1943) c. 50, art. 4, §401 *et seq.*; WILCOX, *op. cit. supra* note 58(17) at 274.

[139] *See, e.g.*, Okla. Stats. 1941, tit. 15, §591 *et seq.*; WILCOX, *op. cit. supra* note 58(17) at 274.

[140] *See, e.g.*, TEX. REV. CIV. STATS. (Vernon, 1942) art. 911a, §§5–9.

[141] 49 STAT. 543, 551 (1935), 49 U. S. C. A. §§301, 306, as amended, 54 STAT. 919 (1940), 49 U. S. C. A. §§301, 306 (Supp. 1946).

[142] 40 STAT. 516 *et seq.* (1918), 15 U. S. C. A. §61 *et seq.* (1941).

permitted to coöperate in the control of prices and sales in the export trade so long as such activities did not affect domestic markets in the products. That the elimination of competition between these producers has extended even to domestic markets has been shown by several reports.[143] Finally, and without having mentioned all the exceptions from competitive behavior which have been allowed to business managers deemed to require special protection of the state, the various oil and gas conservation measures of the state and federal governments deserve mention. The state acts[144] as supplemented by the Connally Act[145] are a recognition that uncontrolled competition in the production and sale of these natural resources must be prevented if maximum recovery of the oil and gas and adequate prices are to be obtained.[146]

Farmers, like certain business managers, have in many instances been excepted from the requirement of competitive behavior in order to enable them to compete on an equal basis in the national markets. The federal program began in 1914[147] by excepting the coöperative marketing associations previously discussed from the antitrust laws. By 1929, the federal government was encouraging the formation and extension of these associations by financing their operations.[148] Every state but one had by 1928 followed the lead of the federal government relative to the promotion of these associations.[149] It remained, however, for the Agricultural Adjustment Acts[150] to achieve more comprehensive state controls than the limited group efforts in the establishment of non-competitive markets among farmers. The new collective bargaining power of the farmer enabled him to obtain a fair share of the national income which has steadily increased with the effectiveness of the state controls.

Legislative attempts to increase the collective bargaining power of workers by sanctioning union-security agreements have already been mentioned. They constitute a conception that the individual worker, similarly to many business men and farmers, has no bargaining power in an increasingly non-competitive economy and that his only mode of attaining an equality of bargaining power and maintaining it is through such agreements. The Texas statute and others like it proscribe these agreements, without more, as an abuse of the rights of

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[143] BERGE, *op. cit. supra* note 58(3) at 192–207.

[144] *See e.g.*, TEX. REV. CIV. STAT. ANN. (Vernon, 1937) arts. 6004–6066, as amended, (Supp. 1946).

[145] 49 STAT. 30 (1935), 15 U. S. C. A. §§715–715l (1939), as amended, 59 STAT. 307 (1946), 15 U. S. C. A. §715m (Supp. 1946).

[146] BURNS, *op. cit. supra* note 58(6) at 22–24.

[147] 38 STAT. 730, 731–(1914), 15 U. S. C. A. §§12, 17 (1941).

[148] 46 STAT. 11 *et seq.* (1929), as amended, 12 U. S. C. A. §1141 *et seq.* (1945).

[149] WILSON, *op. cit. supra* note 58(17) at 270.

[150] 48 STAT. 31 *et seq.* (1933), as amended, 7 U. S. C. A. §601 *et seq.* (Supp. 1946) and 52 STAT. 31 *et seq.* (1938), as amended, 7 U. S. C. A. §1281 *et seq.* (Supp. 1946).

individual unorganized workers and of business managers even though membership in the union making the agreement is assumed to be open to all workers who can qualify with reasonable entrance requirements. In determining whether such a condition is an abuse at all or one which the state can declare intolerable, the Court will likely examine the necessity to workers of union-security agreements as a justifiable mode of competition as well as the many exceptions now existing to competitive behavior in favor of business men, farmers, and workers. The Court may find that the mode of competition is justifiable and that banning of union-security agreements will place workers in an extremely unfavorable position to compete in the national markets for an adequate share of the national income. In such a case, a second irrational basis of the legislation will have been established.

Assuming for the moment that the Supreme Court might hold that union-security agreements are not, without more, abuses which the state could forbid, what conditions remain which can be considered as abuses the Texas legislators sought to eliminate by the ban on these agreements? These are the abuses which are said to follow from the agreements because union efforts in obtaining or maintaining them cause widespread labor-management conflicts, because when made the agreement gives labor unions the power to make and enforce unreasonable demands against business managers, and finally because the agreements cause or accelerate the evils of the closed union. Most of the available materials indicate that these were the purported abuses for which the statutory ban was adopted to eliminate.[151]

There is almost overwhelming evidence that union-security agreements or efforts by unions to obtain and maintain them do not cause labor-management conflicts to any degree. Rather such evidence indicates that the agreements, far from being a cause, have proved to be a solvent for such conflict. Judicial notice of this evidence can be found in most state and federal reports.[152] The United States Depart-

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[151] TONER, *op. cit. supra* note 13 at 115–147 (this is an excellent treatment of the attitude of business managers toward union security agreements); American Affairs, April, 1947, pp. 119–122; 9 N.A.M. LAW DIG. 17, 32-34 (1946); also see note 9 *supra*.

[152] *See, e.g.*: the statement of Mr. Justice Jackson, who dissented on grounds not pertinent here, in Wallace Corporation v. N. L. R. B., 323 U.S. 248 at 267 (1944): ". . . a closed shop is the ultimate goal of most union endeavor and not a few employers have found it a stabilizer of labor relations by putting out of their shops men who were antagonistic to the dominant union, thus ending strife for domination." Also see Mississippi Theaters Corp. v. Hattiesburg Local Union No. 615, 174 Miss. 439, 447, 164 So. 887, 890 (1936): ". . . it is now the deliberate conclusion of economists and employers of labor that collective bargaining, that is, the entering into contracts for labor [in this case for a closed shop] with employers by a union through its representatives is helpful, and advances the general public welfare, in that boycotts, lockouts, strikes, picketing, and attendant evils, can best be avoided by recognition of the principle."

ment of Labor recently reported that most examples of industry-wide bargaining based on union-security agreements have established labor-management relationships which have been remarkably peaceful and stable for many years.[153] For example there have been no major strikes in the glassware industry since 1888, the sprinkler and fire control industry since 1915, the pottery industry since 1922, and the full fashioned hosiery industry since 1927 . . . all of which industries have accorded to their workers some form of union-security agreement. A more striking example in view of past conflict is that reported by Professor Shulman who has acted as umpire since 1943 between labor and management under a union-security agreement at the Ford Motor Company.[154] By virtue of his skill in umpiring and of the employee discipline which normally obtains under such agreements, Mr. Shulman handled approximately eleven hundred disputes arising under the agreement during the first three years of his tenure in such a way as to obviate all the potential causes of strikes. Comprehensive studies are available relative to the successful operation of collective bargaining agreements in general and of the umpire system in particular.[155]

The most compelling evidence, however, that these agreements do not cause conflicts is that in 1946 an estimated 50,000 of the in excess of 50,000 collective bargaining agreements throughout the country were renewed without a single work stoppage.[156] While no exact figures are available, the Department of Labor studies would seem to indicate that in the vicinity of 85 to 90 per cent of all these agreements were renewed and disputes settled without a strike during the greatest strike wave in the nation's history. Out of some 15,000 labor disputes handled by the United States Conciliation Service in 1946, three out of every four were settled peacefully.[157] Although there were some 4,900 work stoppages in 1946, only two and one-half per cent had for their sole object the establishment or obtaining of a closed shop or union shop form of union-security agreement.[158] It can hardly be argued that some 130 strikes for a closed or union shop in the whole country constituted widespread labor-management conflict in 1946. The remaining 4,800 strikes and stoppages had causes other than efforts by unions solely for union-security. The evidence, therefore, fully supports the proposition that union-security

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[153] Patterson, *Collective Bargaining with Associations and Groups of Employers*, 64 MONTHLY LABOR REV. 397 (U. S. Dep't of Labor, Mar. 1947).

[154] SHULMAN, OPINIONS OF THE UMPIRE, FORD MOTOR CO. AND UAW-CIO, 1943-1946 (1946).

[155] TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS 26-27, 152-154, 417-422, 458-460, 606-607 (1942).

[156] Crowther, *Work Stoppages Caused by Labor Management Disputes in 1946*, 64 MONTHLY LABOR REV. 780, 784 (U. S. Dep't of Labor, May, 1947); also *see*, 63 MONTHLY LABOR REV. 872-892 (U. S. Dep't of Labor, Dec., 1946).

[157] Crowther, *op. cit. supra* note 156 at 784.

[158] *Id.* at 795.

agreements and efforts made in obtaining them do not cause but rather resolve labor-management disputes. In so far as the Texas statute was adopted with a view to ending disputes purportedly caused by these factors, the Court may take judicial notice of the above facts and hold that they establish a third irrational basis for the statutory ban.

A second indictment of the union-security agreement from the standpoint of abuses which follow from it is that when the agreement is obtained, labor unions are given excessive power with which they make unreasonable demands of business managers. Next to the charge just treated, this is the most frequently urged indictment of union-security agreements. Since the statutory bans were adopted immediately following the 1946 strike wave, it is important to examine the actual demands by labor unions which led to the work stoppages. With reference to the objectives and not to the amounts of the demands, a breakdown[159] of the 4,900 work stoppages in 1946 indicates that 81 per cent of them were primarily for higher wages, shorter hours, and other immediate conditions of employment; 14 per cent were for the establishment of union organization in business plants; and 3.5 per cent were the result of jurisdictional or inter-union disputes. Thus, 95 per cent of the demands made by unions in 1946 were for objectives unions have always sought and which no court or legislature has in the last fifty years said were unreasonable objectives of collective bargaining.

Since the question of whether union-security agreements and efforts to obtain them can be banned by states as abuses, without more, has already been treated, we can place outside of the question here involved the 14 per cent of disputes over union organization. Jurisdictional disputes can also be dismissed as a possible justification or reason for the statutory bans on the agreements. In the first place they constituted only three and one-half per cent of all disputes. In the second place they occurred wholly without reference to the existence of agreements. They were usually instigated by unions which had no agreement and had as their primary purpose the allocation of a work function between two unions rather than the obtaining of union-security conditions.[160] Finally, the Texas legislature adopted at its last session a law specifically prohibiting jurisdictional disputes, which indicates that Texas legislators had another purpose in mind than the stopping of such disputes when they adopted the statutory ban on union-security agreements.[161] The question, therefore, narrows down to whether a state can ban these agreements in order to cut down the power of unions to make demands for higher wages, shorter hours, and other immediate conditions of employment which the legislators considered, in whole or in part, to be unreasonable. Neither

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[159] *Idem.*

[160] ARNOLD, *op. cit. supra* note 58(1) at 252–253; GREGORY, *op. cit. supra* note 32 at 410–411 and 113–114; Newman, *op. cit. supra* note 15.

[161] Tex. Laws 1947, c. 138, H. B. No. 41, 14 (Vernon's Sess. Law No. 4, pp. 239–241, 1947).

the statute nor the statement of the manager of the Texas bill indicates which of these demands the legislators considered unreasonable. The means adopted affect all such demands whether they be classified as reasonable or unreasonable, since power of unions is intended to be cut down to make any demands.

The Supreme Court has frequently indicated that the right of the worker to bargain collectively for these matters was not created by the National Labor Relations Act but that the right is a fundamental one having its roots in the Constitution.[162] The reasonableness of demands for wages, hours, and conditions of employment has always been left by the courts to be determined by the disputants themselves through the collective bargaining process. Prior to the passage of the statutory bans on union-security agreements, one state had attempted a solution of labor-management conflicts by compulsory arbitration. The statute was declared unconstitutional in the case of *Wolff Packing Co. v. Court of Industrial Relations.*[163] It was conceived by the Supreme Court that as long as there is a Fourteenth Amendment in the Constitution there can be no liberty of contract where a court writes the terms of the contract for the parties to a labor-management dispute, except in cases of emergency in industries clearly affected with a public interest. The approaches to the problem of labor-management conflicts made by legislatures, therefore, have been confined to a laissez-faire policy as represented by anti-injunction statutes, by legislation setting up conciliation and bargaining devices, or to a combination of the two approaches. While it cannot be said that the Texas legislature has passed a compulsory arbitration statute in banning union-security agreements, it has so stringently limited the employees' power to bargain collectively on a voluntary basis for the usual conditions of employment that an effect substantially similar to compulsory bargaining has been reached. Going further than the Kansas Court of Industrial Relations might have gone, the Texas legislature has, in effect, sat as such a court and make an award that, in no instance, is a union-security agreement a permissible end of collective bargaining—an award made in the fact of compelling evidence that such agreements operate to cut down labor-management conflict when reached by a voluntary bargaining process. Clearly the approach of the Texas legislature cannot be said to represent a laissez-faire policy or an attempt to foster voluntary bargaining and settlement of disputes. The Court may find, consistently with its prior position in the *Wolff* case,[164] that the adoption of legislation banning union-security agreements having for its purpose and necessary effect the cutting down of employees' power to make demands for higher wages, shorter hours, and other immediate conditions of employment is

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[162] Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 309 U.S. 261, 263 (1940).

[163] Wolff Packing Co. v. Court of Industrial Relations, 267 U.S. 552 (1925); Note, 38 HARV. L. REV. 1097 (1925).

[164] See note 163 *supra*.

beyond the power of the state. Such a decision would mean that a legislature either cannot prejudge what constitutes a reasonable demand by workers for immediate conditions of employment or that it cannot adopt legislation which in effect classifies all such demands as unreasonable.

The third indictment of union-security agreements is that they accelerate or cause closed unions or the evils of such arrangements. No accurate evidence is available on the exact extent and scope of the closed union by which unreasonable entrance requirements or arbitrary expulsions prevent qualified workers from becoming or remaining members of a union. When a closed union co-exists with a union-security agreement, a virtual monopoly of the labor market is created to the detriment of both individual workers outside the union and of business managers who are parties to the agreement.[165] Although an individual worker may be highly qualified and may have a promise of employment, he is unable in such a situation to work in his trade. Not only may a business manager be precluded by such a condition from hiring qualified workers but he may also be required to discharge a qualified employee who has been ousted by the union without just cause. The only recourse of the ousted worker is to pursue an expensive and often fruitless appeal to his national union or to the courts, to change his trade, or to move outside the jurisdiction of the closed union.

While there have been instances of abuses of closed unions, there is no evidence to show that the closed union has been the inevitable result of union-security agreements or even closely associated with the agreements. There is, moreover, general evidence to show that workers are freely admitted to unions having union-security agreements in existence. In the first place, the objective of union-security agreements, as has been frequently observed, is not to limit entrance into the union but rather to increase union membership.[166] That the objective has been realized is shown by an examination of the progress unions have made since legislative sanction was generally given to union-security agreements. In 1933, there were approximately 3,000,000 union members. As a result of the various anti-injunction statutes and affirmative sanctions of the agreements, union membership had increased to approximately 15,000,000 in 1947.[167] Further, it is established by various studies that what incidence there is of closed unions, it is less in times of prosperity and greater in periods of economic distress when unions may seek to protect the jobs of their members.[168] The postwar period which presumably led to the passage of the statutory bans on union-security agreements was one of increasing prosperity in which jobs were so plentiful that unions could

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[165] TAYLOR, LABOR PROBLEMS AND LABOR LAW 90 (1939); also see note 15 *supra*.
[166] See note 124 *supra*.
[167] See note 156 *supra*; also see WOLMAN, EBB AND FLOW IN TRADE UNIONISM 34 (1936).
[168] See notes 15 and 124 *supra*.

not supply all the workers required by employers. In many instances business managers hired whom they could. Some unions joined with business managers in apprentice training programs in order to increase the supply of trained workers. Finally, the growth of industrial unions as opposed to craft unions in recent years has operated to facilitate entrance to unions by workers of all classes within a plant.

Where union-security agreements are combined with an umpire or chairman system, the evidence shows that arbitrary expulsions of union members cannot be made the basis for requiring a business manager to discharge the ousted member.[169] Many courts and most legislatures, moreover, have acted to proscribed in recent years arbitrary union practices in excluding nonunion workers or in expelling union members.[170] The Court might find, on the basis of the available evidence, that union-security agreements neither cause nor accelerate the evils of closed unions. It might also find that, if it can be said that a union-security agreement may operate to make a closed union more detrimental to the interests of unorganized workers and business managers, the incidence of the condition is counterbalanced by the proven beneficial results of the agreements in eliminating labor-management conflicts and in extending their protection to increasing numbers of workers. In such a case, the Court may say that legislation banning union-security agreements in order to eliminate the evils of closed unions adopts means which are not reasonably related to the end in view.

V. *Assuming the Existence of the Purported Conditions, Is the Total Deprivation of the Rights Affected, Rather Than Regulation Thereof, Necessary?*

In the due process cases before 1937, the Court applied a criterion to the effect that where the deprivation effected by a statute was very great, the abuses sought to be corrected must be reasonably commensurate. Under its policy of judicial self-restraint, the present Court has rarely used any such criterion. Where the taking related to what clearly fell within an established category of property, the criterion was whether the exercise of the power could be sustained under the "police power" or must be paid for on the theory of eminent domain.[171] Where the taking did not fall within such a category, the criterion was stated as part of the requirement that the means adopted be reasonably adapted to the end in view.[172] It is clear, however, that what the Court was doing when it expressed a sensitiveness about the degree of the taking, either in the property or other than property cases, was a questioning of whether the state should not have taken less drastic, alternative, and fairer steps rather than whether the

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[169] See notes 154–155 *supra*.

[170] See notes 15 *supra* and 187 *infra*.

[171] See Note, *Constitutional Law—Line Between Police Power and Eminent Domain . . .*, 35 Col. L. Rev. 938 (1935).

[172] Liggett Co. v. Baldridge, 278 U.S. 105 (1928).

means adopted were efficacious to any degree in eliminating actual abuses.[173]

In the *Mahon* case, although one falling in that twilight zone between eminent domain and the "police power," Mr. Justice Holmes indicated the temper of the Court before 1937: "The extent of the public interest is shown by the statute to be limited . . . on the other hand the extent of the taking is very great."[174] In the *Palmer Brothers* case,[175] the Court held that an absolute prohibition, as opposed to regulation, of the use of all forms of a manufacturing technique was a denial of due process where it was established by the plaintiff's evidence that at least one of the forms of such technique was clearly capable of avoiding the evils sought to be eliminated by the statute. Although Justice Holmes dissented[176] here with Justices Stone and Brandeis, he placed his opinion on the admitted fact that the end-products of all techniques were indistinguishable in appearance and that the evil was very great which the state sought to eliminate by the absolute prohibition. He thus implied that if it were clearly possible to distinguish the end-products of good and bad techniques he might question the absolute prohibition. Similarly in the *Baldridge* case,[177] where the Court was sensitive about the degree of the taking or deprivation, it was impressed that certain statutes, other than the one under consideration which effected an absolute prohibition, attacked specific evils so as to cover amply the particular field regulated and to protect adequately the public welfare without the absolute prohibition. This "super-legislative" technique[178] as it has been called by some of the judges continues to be a reserve power of the Court where it considers the taking or deprivation under the state statute very great in the due process cases or the burden or discrimination excessive in the cases involving state regulation of interstate commerce where Congress has not acted.

If the Court takes up this third issue in seeking to protect what it conceives to be fundamental rights of workers, it will likely examine not only what other legislatures have done by regulation rather than absolute prohibition but also what the Texas legislature has done in attempting to resolve labor-management conflicts other than by banning union-security agreements. Legislatures taking the regulative approach have adopted three methods: (A) regulation of the mode of use of union-security agreements,[179] (B) regulation of the form

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[173] Brown, *Due Process, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 960-968 (1927).

[174] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-414 (1922).

[175] Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

[176] *Id.* at 415.

[177] Liggett Co. v. Baldridge, 278 U.S. 105, 112-113 (1928).

[178] See Mr. Justice Black's dissent in Southern Pacific Co. v. Arizona, 325 U.S. 761 at 784, 788 note 4 (1945).

[179] 3 COLO. STATS. ANN. (Michie Supp. 1946) §94(64)(e) (requires three-fourths of employees in a bargaining unit to vote authority for the execution of the agreement); N. H. REV. LAWS 1942, c. 212, §21, as amended, Laws 1947, c. 194, §§21,

the agreements may take,[180] (C) regulation of specific evils said to arise from or exist with such agreements.[181] The Taft-Hartley Act combines all three approaches.[182] Most of the legislatures have regulated specific abuses only, while a few have regulated either the mode of use or the form of union-security agreements. All these approaches assume the necessity for union-security agreements but attempt regulation rather than absolute prohibition in order to protect the interests of all workers, business managers, and the public.

The Texas legislature not only banned union-security agreements but it also adopted legislation looking to all the specific abuses which have been said to cause labor-management conflicts. Jurisdictional disputes,[183] secondary pressures of all forms,[184] mass picketing,[185] union restraints of trade[186] and closed unions[187] were all prohibited by means well calculated to achieve their objectives. If the Court concludes under the first issue that the deprivation effected by the statutory ban on union-security agreements is very great and under the second issue that several irrational bases for the legislation exist, it may take the position that the legislation banning specific abuses amply covers the field regulated and adequately protects the interests of all concerned. It may further hold that, in view of this legislation, the absolute prohibition of union-security agreements and of pressures used in obtaining them constitutes too drastic a means and lies beyond the power of the state.

D. The Due Process Clause and the Congressional Consent Doctrine

In adopting the Taft-Hartley Act, Congress took cognizance of the state statutes banning union-security agreements and the deadly power of the congressional consent doctrine. By adding a new subsection[188]

21-a, 2A CCH LAB. LAW SERV. 44601, 44602 (1947) (requires two-thirds of employees voting to authorize execution of the agreement, but they must be at least a majority of all employees in the bargaining unit); WIS. STATS. 1943, §111.06(c)1, as amended, Laws 1945, c. 424 (same requirement as under the N. H. law); Kan. Gen. Laws 1943, No. 264, §8(4) (requires majority of employees in a bargaining unit to vote authority for the agreement).

[180]Me. Laws 1947, c. 25, §41-A, as added, c. 395, 2A CCH LAB. LAW SERV. 43301 (1947) (prohibits closed shop form of union-security agreements but permits union shop form).

[181]See notes 182–186 *infra*.

[182]29 U. S. C. A. §151 *et seq.* (Supp. July, 1947).

[183]Tex. Laws 1947, c. 138, H. B. No. 41, §4 (Vernon's Sess. Law No. 4, pp. 239–241, 1947).

[184]Tex. Laws 1947, c. 387, S. B. No. 167 (Vernon's Sess. Law No. 6, pp. 779–781, 1947).

[185]Tex. Laws 1947, c. 138, H. B. No. 41, §1 *et seq.* (Vernon's Sess. Law No. 4, pp. 239–241, 1947).

[186]Tex. Laws 1947, c. 310, H. B. No. 276 (Vernon's Sess. Law No. 5, pp. 530–531, 1947); Tex. Laws 1947, c. 309, S. B. No. 269 (Vernon's Sess. Law No. 5, pp. 528–529, 1947).

[187]TEX. REV. CIV. STAT. ANN. (Vernon, supp. 1946) art. 5154a, §§7, 8, 10.

[188]See note 6 *supra*.

to the National Labor Relations Act, the legislators made clear the congressional intent to authorize state regulation of interstate commerce in so far as policy toward union-security agreements is concerned. The explanation of the final bill by conference committee managers meticulously pointed out that it was not the intent of the members of Congress in 1935 and was not the intent of the present Congress to preempt the field through section 8(a)(3).[189]

If there are limits to the doctrine of congressional consent to state regulation of interstate commerce, the Supreme Court has yet to pick them out. As the Court itself observed in the *Prudential* case[190] decided in 1946, it has never overridden a legislative disclaimer based on the commerce clause of a prior judicial disapproval relative to a state regulation of interstate commerce. Mr. Chief Justice White once suggested there was a limitation on the power of Congress to consent to state legislation, but the situations presented to the Court since the *Clark* case[191] have not required a decision on the point. An examination of the consent doctrine from *In re Rahrer*[192] to the *Prudential* case indicates that although the state has no power to regulate interstate commerce by legislation which would otherwise be an unreasonable burden on or a discrimination against such commerce, nevertheless Congress by authorizing the state to act can cure its lack of power.[193] It is beside the point, therefore, to pursue an inquiry to determine if the state statute constitutes an excessive burden on or a discrimination against interstate commerce (it is clearly not the latter as both types of commerce are similarly regulated). In the statutes banning union-security agreements, the Court faces a different situation from those presented in earlier consent doctrine cases. Not only is the due process issue clearly involved, but claims will be asserted which are susceptible to classification as personal rights. No one has ever doubted that Congress cannot under the commerce clause adopt legislation which violates the due process clause. If the Court reaches a decision that workers possess fundamental rights under the Thirteenth or Fourteenth Amendments or both which are denied to them by state statutes banning union-security agreements and pressures utilized in obtaining them, it seems quite clear that the consent of Congress to these statutes as they relate to interstate commerce will not validate them. In such a case, the Court will say that the amended federal labor act which permits states to impair fundamental rights of workers in interstate commerce is itself a denial of due process or a violation of the Thirteenth Amendment.

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[189] CONFERENCE COMMITTEE REPORT ON H. R. 3020, OFFICIAL EXPLANATION OF THE FINAL BILL BY CONFERENCE COMMITTEE MANAGERS ON THE PART OF THE HOUSE, 8 CCH SPECIAL 33 (1947).

[190] *See*, Prudential Life Insurance Co. v. Benjamin, 328 U.S. 408, 424–426 (1946).

[191] *See*, Clark Distilling Co. v. Western Maryland Ry., 242 U.S. 311, 332 (1917).

[192] 140 U.S. 545 (1891).

[193] *See*, International Shoe Co. v. Washington, 326 U.S. 310, 315 (1945).

VI. Conclusion

The policy of judicial self-restraint which the Supreme Court has pursued since 1937 logically should call for upholding "restrictive" as well as "social" legislation for it assumes that the legislature is a more competent agent than the Court in economic and social matters. State statutes banning union-security agreements should logically, therefore, be held constitutional. Such a conclusion, however, overlooks indications in at least three decisional trends that the present Court conceives that workers have some fundamental rights guaranteed to them, as workers, by the Constitution. This comment has outlined two approaches the Court may take if it sets out to fit the claims of right likely to be asserted in a challenge of the Texas statute into the constitutional framework. It has further stated some of the material which the Court may consider, irrespective of its approach in balancing the interests of the business man, the worker, and the public. The Court has already avoided a decision on the basic due process issue involved in these statutory bans and it is likely to take considerable time before it makes its eventual decision when the issue is properly raised. Whatever the decision will be on the merits, it will have repercussions of a far-reaching character on the relationship between business and labor.

Joseph P. Witherspoon, Jr.

APPENDIX F.

Cases Upholding Union Shop Agreements

Arizona:

Corpuz v. Restaurant Employees, etc., 61 Ariz. 483, 151 Pac. (2) 705.

Arkansas:

Meier v. Speer, 96 Ark. 618 (1910) 132 S. W. 988.

Harman v. United Mine Workers, 166 Ark. 255, 266 S. W. 84 (1924).

California:

Parkinson v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027 (1908).

Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909).

Overland Publishing Co. v. Union Lithograph Co., 57 Cal. App. 356, 207 Pac. 412 (1922).

Smith Metro Market Co. v. Lyons, 106 P. (2d) 414 (1940).

Shafer v. Local 1172, 106 Pac. (2d) 403 (1940).

McKay v. Retail Automobile Salesmen Local Union, etc. 16 Cal. (2) 311, 106 P. (2d) 373 (1940), certiorari denied, 313 U. S. 56.

Colorado:

Denver Local Union No. 13, etc. v. Perry Truck Lines, 101 P. (2d) 436 (1940).

Connecticut:

Conn & Roth Electric Co. v. Bricklayers' Union, 92 Conn. 161, 101 Atl. 659 (1917).

Florida:

Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 Sou. 590 (1907).
Int. Assoc. of Machinists v. State, 15 So. 2d 485 (1943).

Illinois:

Kemp v. Division No. 241, 255 Ill. 213, 99 N. E. 389 (1912).

Fenski Bros. v. Upholsterers Union, 358 Ill. 239 (1934).

Schuster v. International Assn. of Machinists, etc. 293 Ill. App. 177, 12 N. E. (2d) 50 (1937).

Indiana:

Clemmitt v. Watson, 14 Ind. App. 38, 42 N. E. 367 (1895).

Shaughnessey v. Jordan, 184 Ind. 499, 111 N. E. 622 (1916).

Scofes v. Helmer, 205 Ind. 596, 187 N. E. 662 (1933).

Louisiana:

Baton Rouge Bldg. Trades Council v. T. L. James & Co., 10 Sou. (2d) 606.

Maryland:

Seymour Ruff & Son v. Bricklayers, etc., Union, 163 Md. 687, 164 A. 752 (1933).

Massachusetts:

Although Massachusetts condemns a strike for a closed shop, nevertheless, *it does uphold the validity of closed shop agreements voluntarily* entered into, and protects such agreements against interference or breach.

Hoban v. Dempsey, 217 Mass. 166, 104 N. E. 717 (1915).

Shinsky v. O'Neil, 232 Mass. 99, 121 N. E. 790 (1919).

Smith v. Bowen, 232 Mass. 106, 121 N. E. 814 (1919).

United Shoe Machinery Co. v. Fitzgerald, 237 Mass. 537, 130 N. E. 86 (1921).

Goyette v. C. V. Watson Co., 245 Mass. 577, 140 N. E. 285 (1923).

Tracey v. Osborne, 226 Mass. 25, 114 N. E. 959.

Ryan v. Hayes, 243 Mass. 168, 137 N. E. 344.

H. E. Sterns Lumber Co. v. Howlett, 260 Mass. 45, 157 N. E. 82 (1927).

Berry v. Old South Engraving Co., 283 Mass. 441, 186 N. E. 601 (1933).

Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753.

Michigan:

Book Tower Garage v. Local No. 415, 295 Mich. 580, 295 N. W. 320 (1940).

Minnesota:

Grant Construction Co. v. St. Paul Building Trades Council, 136 Minn. 167 (1917).

East Lake Drug Co. v. Pharmacists, etc., Union, 4 C. C. H. Labor Cases 61, 612 (1941).

Mississippi:

Mississippi Theatres Corp. v. Hattiesburg Local Union, 174 Miss. 439, 164 Sou. 887 (1936).

Montana:

Empire Theatre Co. v. Cloke, 53 Mont. 183, 163 P. 107 (1917).

Nebraska:

State v. Employers of Labor, 102 Neb. 768, 774, 169 N. W. 717, 719 (1918).

New Jersey:

The New Jersey court is frequently referred to as one outlawing the closed shop, and the case of *high Structural Steel Co. v. Atlantic, etc., Works*, 92 N. J. Eq. 770, 111 Atl. 376, is usually referred to in support of that assertion. However, recent decisions by the Court of Errors and Appeals have upheld the closed shop, and in one case—the Oystermen's case, hereinafter cited—this was upheld, although the closed shop covered an entire area and industry.

Wilson v. Newspapers & Mail Deliverer's Union, 123 N. J. Eq. 347, 197 Atl. 720.

East Company v. United Oystermen's Union, 4 Labor Cases C. C. H., p. 62, 67 (decided September 19, 1941).

Kingston Trap Rock Co. v. International Union of Operating Engineers, etc., 19 A. (2d) 661 (N. J. Errors & App., 1941).

Bayonne Textile Corporation v. American Federation of Silk Workers, 116 N. J. Eq. 146 (1934).

Heine's, Inc. v. Truck Drivers & Helpers Local, etc., 19 A. (2d) 204 (1941), reversing 127 N. J. Eq. 514, 14 A. (2d) 262 (1940).

Hudson Bus Ass'n v. Hill Bus Co., 121 N. J. Eq. 582, 191 Atl. 763 (1937).

E. L. Kerns Co. v. Landgraf, 128 N. J. Eq. 441, 16 A. (2d) 623 (1940).

Four Plating Co., Inc. v. Mako, et al., 194 A. 53 (N. J., 1937).

Canter v. Furniture Employees Local 109, 122 N. J. Eq. 575, 196 At. 210.

New York:

Williams v. Quill, 277 N. Y. 1, 12 N. E. 2 (d) 547 (1938).

National Protective Ass'n v. Cummings, 170 N. Y. 315, 63 N. E. 369 (1902).

Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5 (1905).

Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2) 910.

Exchange Bakery v. Rifkin, 245 N. Y. 260 (1927).

De Agostina v. Parkshire Ridge Amusements, 155 Misc. 518, 278 N. Y. Supp. 622 (1935).

Farulla v. Fruendlich, Inc. 152 Misc. 761, 274 N. Y. S. 70 (1934).

Farulla v. Fruendlich, Inc., 153 Misc. 738, 277 N. Y. S. 47 (1935)

Mills v. United States Printing Co., 99 App. Div. 605, 91 N. Y. Supp. 185 (1904).

Murphy v. Higgins, 12 N. Y. S. (2d) 913 (1939).

Roosevelt Amusement Corp. v. Empire State Motion Picture Operators' Union, 144 Misc. 644, 258 N. Y. Supp. 240 (1930).

Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 159 N. E. 863.

Ohio:

Local Branch No. 248 v. Solt, 8 Ohio App. 437 (1918).

S. A. Clark v. Local No. 106, 154 N. E. 362.

Oklahoma:

Roddy v. United Mine Workers, 41 Okla. 621, 139 Pac. 126 (1914).

Pennsylvania:

Brown v. Lehman, 15 Atl. (2d) 513 (1940).

Rhode Island:

Rhodes Bros. Co. v. Musicians Protective Union, 37 R. I. 281, 92 Atl. 641 (1915).

Tennessee:

Powers v. Journeymen Bricklayers' Union, 172 S. W. 284, 130 Tenn. 643 (1914).

Texas:

Harper v. Local Union No. 520, 48 S. W. (2d) 1033 (1932).

Underwood v. Texas & P. Ry. Co., 178 S. W. 38 (1915).

Washington:

Marvel Baking Co. v. Teamsters' Union, Local No. 524, 105 Wash. Decisions 297, 105 Pac. (2d) 46 (1940).

Wisconsin:

Adler & Sons Co. v. Maglio, 200 Wis. 153, 228 N. W. 123 (1929).

American Furniture Co. v. International Brotherhood of Teamsters, etc., 222 Wis. 338, 370, 268 N. W. 250, 265, (1936).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 27

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL.,
Appellants,

vs.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

Appeal from the Supreme Court of the State of Arizona

No. 47

LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL.,
Appellants,

vs.

NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION

Appeal from the Supreme Court of the State of Nebraska

No. 34

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, ET AL.,
Appellants,

vs.

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Appeal from the Supreme Court of the State of North Carolina

REPLY BRIEF FOR APPELLANTS

I

Appellees in the Arizona case argue (Br. pp. 50-51), and we agree, that if the statutes in issue in this case are upheld on the theory that they validly protect an alleged right to work as a non-unionist, then it follows inevitably from *Shelley* v. *Kraemer*, 334 U. S. 1, that the laws of the thirty-five States which enforce union-security contracts are unconstitutional. For, in enforcing such agreements,

these States do deny to persons who refuse to join the contracting labor organization the very same alleged right which the Arizona appellees rely upon here. The issue then is not, as such appellees suggest (Br. pp. 6-25), merely whether the States which outlaw union-security contracts are acting "reasonably"—the issue is whether it is the minority of States which outlaw, or the majority of States which enforce union-security agreements, which are denying fundamental rights guaranteed by the Constitution. If, as a majority of the States believe, there is no right to work as a non-unionist which warrants denying to union members the right to use any lawful means, including union-security agreements, to induce non-members to join, the absence of such a right is attributable to recognition that the constitutional right to form and join labor organizations comprehends the right to use all lawful means to eliminate non-union competition. If the laws in these States, which have stood unchallenged for many years, are constitutional, the statutes in issue in these cases must fall.

II

Arizona appellees also appear to recognize that the result of their constitutional philosophy in this case is to deny to labor organizations, as such, any of the protections accorded by the First Amendment (Br. p. 39). The attempted denial to labor organizations of the right to engage in political activity with which this Court dealt in *United States* v. *C. I. O.*, 335 U. S. 106, was predicated precisely on the philosophy advanced here that protection of the "rights" of dissident members warranted prohibition of political activities of the organization which were authorized by a majority of its membership. In that case it was urged that the alleged right of a union member to refrain from participation in the union's political activities warranted destruction of the right of labor organizations to take effective political action. In this case it is urged that the alleged right to work as a non-unionist warrants

destruction of the right of labor organizations to function effectively in the economic sphere. In either case recognition of the claimed individual right would deny to labor organizations rights which this Court has recognized are conferred upon them by the Constitution.

III

Critical to the argument of appellees in all these cases is the assertion that union-security agreements are devices whereby labor organizations secure a monopoly of the labor supply, and that labor monopolies, equally with business monopolies, are subject to outlawry under the Constitution (Br. pp. 25, et seq.). If this argument were valid, it would mean that all labor organizations could constitutionally be outlawed. If employees who join together to eliminate competition among themselves over wages and working conditions are deemed constitutionally on a parity with businessmen who combine to eliminate price competition, then, no matter how voluntary their association, and even if their group is restricted to employees of a single employer, their organization may constitutionally be condemned. Such a result could be reached only by ignoring, as appellees do, the fact that opportunity for workers to improve their wages, hours and working conditions through the elimination of competition among themselves is guaranteed by the Constitution as the only meaningful alternative to virtual slavery, and that this goal is a corollary of, not antithetical to, an economic system based on competition among businessmen. Elimination of competition over wage rates and working conditions within an industry through successful unionization can and indeed does assist, rather than retard, proper operation of that system.

It is true that some labor unions may, on occasions, as appellees urge (Br. pp. 14-19), misuse their powers for the purpose of eliminating price or product competition, or may aid businessmen to achieve monopoly. But possibilities of abuse inhere in all of the great freedoms guaranteed

by the First Amendment; such possibilities have never been deemed an excuse for their abolition. The abuses themselves, indeed, may be checked, but the constitutional right of workers, through self-organization, to achieve equality of bargaining power with employers, and to eliminate competition over wages and working conditions, may not be subverted in the process.

IV

The excuse offered by Arizona appellees for exempting employees who refuse to join labor organizations from the operation of union-security agreements is that allegedly "large labor organizations are so organized and operated that the ruling officialdom exerts a coercive control over the membership, which even large groups of workers are helpless to resist." (Br. pp. 22-23.) While Arizona appellees disclaim that this argument leads to the conclusion that "labor organizations should be suppressed or crippled," it is clear that the approach here adopted by the States, which they defend, comes precisely to this. For, as we have demonstrated in our main brief (pp. 37-61), denial to labor organizations of the right to seek, by lawful means, to eliminate non-union competition does cripple such organizations. The constitutional road to the correction of undemocratic practices where they exist among labor organizations is to require that democratic principles be applied. To substitute anarchy for majority rule, as Arizona appellees would do, accords neither with reason nor with the Constitution.

V

The Arizona appellees make much of the reference made by appellants in their brief to various statutory protections as constituting some equivalent to protections traditionally afforded by union-security agreements, and appellees infer therefrom that labor organizations are now making "demands for statutory security."

No such demand was made or implied; the references to statutory protections were made simply as indicating that the existence of the Railway Labor Act afforded a partial answer to claims that unions in the railroad industry were able to maintain themselves without the union shop. That even these protections are not adequate is demonstrated in our economic brief, pp. 66-80. Nor did appellants intend to imply that the existence or passage of such laws as the Railway Labor Act or the National Labor Relations Act would afford justification for outlawing all types of union-security arrangements. The importance of labor organizations in our society as a practical exercise by workingmen of the right of assembly and as a practical means by which they achieve adequate wages and working conditions dictates that their existence should not be made to depend upon the winds of statutory chance, but that they must be left free to use the traditional and peaceful devices for their maintenance. What the State can give by way of statutory protection today, it can withdraw, or emasculate, or feebly enforce tomorrow.

In any event, a prohibition of "yellow dog" contracts, such as exists in Arizona, or even the prohibition against interference with the right to work as a union member, such as exists in the Nebraska and North Carolina laws, does not afford an equivalent of the protections achieved under union-security agreements. The "yellow dog" prohibitions prevent only the obtaining of commitments from individual workers that they will not join unions; they do not prevent discriminations against union members in obtaining and retaining employment. Even this latter protection is no equivalent for a statutory scheme for compulsory collective bargaining which includes rights of exclusive representation and protections against all forms of employer interference with the right of self-organization, including the outlawing of company-dominated unions. And even such a statutory scheme does not afford protection against a gradual elimination of majority status and dimi-

nution of bargaining strength by replacement of union workers by non-union workers in the course of ordinary turnover.

Respectfully submitted,

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No. 27

AMERICAN FEDERATION OF LABOR, ET AL.,
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Appellees

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October, 1948.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 27

AMERICAN FEDERATION OF LABOR, ET AL.,
Appellants,

v.

AMERICAN SASH & DOOR COMPANY, ET AL.,
Appellees

BRIEF FOR APPELLEES

Opinions Below

The opinion of the Supreme Court of Arizona (R. 111-133) is reported at 67 Ariz. 20, 189 Pac. (2) 912. The Superior Court of Maricopa County in dismissing the bill of complaint (R. 96) rendered no opinion.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(a) of the Judicial Code as amended, 28 U. S. C. A. 344(a). Probable jurisdiction was noted by order of this Court of March 29, 1948 (R. 143).

Statute Involved

This case presents an appeal from a final judgment of the Supreme Court of Arizona, upholding the validity of an

Amendment to the Constitution of the State of Arizona on the ground that it is not repugnant to the Constitution of the United States. This Amendment, commonly described as "Right-to-Work Amendment" reads as follows:

> "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the State or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization."

Corrected Statement of the Case

The statement of the case by appellants is generally adequate, but is inaccurate in its assertions that certain allegations of the complaint are, by the motion to dismiss "thus admitted for the purposes of this case" (Appellants' Brief, p. 9).

Appellees do not admit, but *deny*, that the ability to make union security contracts with employers is "indispensable" to the functioning of appellants and other labor organizations, and to the fulfillment of their purposes.

Appellees do not admit, but *deny*, that "the obtaining of union security agreements constitutes the only proven and effective means for working people to obtain and insure (1) their collective security and the maintenance of their labor unions once organization is achieved; (2) a security of bargaining power as a means of obtaining an adequate share of the joint production of capital and labor, and (3) the consolidation of gains achieved in collective bargaining and the protection of working standards through elimination of the cutthroat wage competition of non-union employees."

Appellees do not admit, but *deny*, that membership in plaintiff labor organizations is "open to all qualified per-

sons and such organizations freely admit qualified applicants into membership and impose no arbitrary or unreasonable requirements as a condition of membership, and that no labor organization in the State of Arizona including the appellants' labor organizations herein exercises or has any monopoly or control by agreement over the supply of labor in any trade, craft, occupation, or calling either in the State of Arizona, generally, or in any city or community within the State, including work involving the employment of millmen, cabinet makers and lumber handlers or other carpentry work."

The allegations that union security contracts are "indispensable" and that the obtaining of such contracts constitutes the "only" proven and effective means to accomplish certain union objectives, are *not allegations of fact* but conclusions which may or may not be drawn from the facts alleged by complainants. Furthermore, these conclusions are contradicted by other allegations of the complaint and are demonstrated to be unsound by factual material presented in the briefs of the appellant-complainants of which this Court is asked to take judicial notice (Appellants Brief, p. 28). Obviously, this Court cannot be asked to take judicial notice of the long and successful struggle of the labor unions to enlarge their memberships and to accomplish their purposes *which were accomplished* in many instances and to a great extent *without the aid of closed-shop contracts* and, at the same time, asked to accept the allegation that such contracts are "indispensable" or that they provide the "only" effective means of accomplishing union objectives.

Nor can this Court be asked to close its eyes to the history of the long and successful struggle of labor unions to have written into statutory law express prohibitions of the use of employer-coercion of employees to join or not to join labor organizations (the struggle against "yellow

dog contracts" and "company unions"), which history has been reviewed extensively in the opinions of this Court and many other courts. Nor will the Court ignore the fact that appellants devote the major part of their briefs to an attempt to convince the Court that union security contracts *are* "indispensable", thus recognizing themselves that these allegations of the complaint are allegations of debatable conclusions which are not admitted by a motion to dismiss.

The allegations that membership is open to all "qualified" persons and that labor organizations "freely admit qualified applicants" and impose "no arbitrary or unreasonable requirements" require an explanation as to who fixes the "qualifications" and what they are, or else the allegation is meaningless. If the qualifications were fixed by legal or scientific standards, the allegations would have one meaning. If they are fixed (which is a fact) by the unions themselves, then all the allegations mean is that the unions admit persons to membership whom they are willing to admit. The motion to dismiss may be regarded as conceding the truism that unions admit to membership those whom they are willing to admit, and that is all that is conceded.

The allegation that appellant labor organizations do not have or exercise "any monopoly or control" over the labor supply by reason of union security contracts is not only a conclusion but also is a conclusion which is disproved by other facts alleged in the complaint and by the closed-shop contract which is attached as an exhibit to the complaint, as will be demonstrated in the subsequent argument of this brief.

There is a minor inaccuracy in appellants' statement that the Supreme Court of Arizona construed the Right-to-Work Amendment as being effective or intended "to prevent employers from employing union members only" (Appel-

lants' Brief, p. 12). The Supreme Court of Arizona sustained the validity of the Amendment, which simply provides that "no person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization" and also that an agreement shall not be made "which excludes any person from employment or continuation of employment because of non-membership in a labor organization." On the face of this it is evident that an employer *now* employing only union members is *not* required to discharge any of them or to hire non-union employees. He may continue all his present employees and he may fill vacancies or add to the number of his employees by hiring additional union members. All he is forbidden to do is (1) to coerce persons now employed or seeking to be employed, into joining a union, by refusing to employ or to retain in his employ persons who are not members of a particular union and who do not wish to become members, or (2) to make an agreement that he will not employ or retain in his employ such persons.

Summary of Argument

I

The Right-to-Work Amendment was enacted in a reasonable exercise of the police power of the State.

II

The Right-to-Work Amendment does not violate the Fourteenth Amendment to the United States Constitution, or the First Amendment.

III

The Right-to-Work Amendment does not violate Article I, Section 10, of the United States Constitution.

ARGUMENT

I

The Right-to-Work Amendment is a reasonable exercise of an acknowledged police power.

It is conceded that the Right-to-Work Amendment was enacted in exercise of the police power of the State of Arizona, and the primary basis for appellants' contention that it violates the due process clause of the Fourteenth Amendment and that it impairs the obligations of contract must be found in the contention that the Amendment is so unreasonable and arbitrary that it must be held an invalid exercise of the police power.

The exercise of an unquestioned legislative power to limit rights of contract, and to regulate the conduct of persons or the conduct of a business, in order to protect the people against evils which menace their health, safety, morals or welfare, is limited only by the requirement that "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."

Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398.

See also:

Nebbia v. *People of State of New York*, 291 U. S. 502;
West Hotel Co. v. *Parrish*, 300 U. S. 379.

The primary question, therefore, presented in an attack upon the constitutionality of the Right-to-Work Amendment is: What are the evils which the law was designed to remedy? Is the law a rational means to remedy these evils?

"We need not labor the point long settled that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom

and propriety are not for the determination of the Courts, but for that of the legislative body on which rests the duty and responsibility of decision." (*Standard Oil Company* v. *Marysville*, 279 U. S. 582.)

It is unnecessary to add a host of old and new citations to demonstrate that the foregoing quotation states an absolutely established rule of law.

Appellants may undertake to argue that there are no evils which flow from discrimination against persons because of non-membership in a labor organization, but such an argument is refuted by information conveyed in a long line of opinions of this Supreme Court and other courts, which are a matter of public record, and by a multitude of facts of which any court must take judicial knowledge. It is only necessary to summarize the evidence from these sources in order to demonstrate that there are evils flowing from the discrimination against persons because of non-membership in a labor organization, which so seriously affect the welfare of the people that legislation against such evils is clearly within the police power.

After a clear exposition of the evils to be remedied by the Right-to-Work Amendment the conclusion is inevitable that the Amendment is a reasonable exercise of the police power in prohibiting by law any discrimination in employment against persons because of non-membership in a labor organization, and prohibiting contracts which exclude persons from employment because of non-membership in a labor organization.

It has been said that a Constitutional Amendment carries with it no stronger presumption of validity than would attach to an ordinary statute, and that the fact that the people have enacted a law, or a Constitutional Amendment, by direct vote, does not increase the presumption as to its validity. But, it should be pointed out that when the Right-

to-Work Amendment was enacted by a direct vote of the people, and by a majority of 61,875 voting for the Amendment, and 49,567 voting against the Amendment (R. 28), it was made clearly evident that the people of Arizona believed that discrimination in employment against persons who were not members of labor organizations was an evil injurious to individuals and to the general welfare, and also believed that the prohibitions of the Right-to-Work Amendment were a reasonable method of limiting such an evil.

Furthermore, the argument that the Arizona law *and* similar laws in other States were not enacted "after deliberation", but as the result of "prejudices" is a baseless asse ion. When legislatures of State after State enact such laws against uniform vigorous opposition from labor unions, extensive deliberations are inevitable. In the case of Arizona the Constitutional Amendment was adopted by the voters themselves after—as required by State law—an official "Publicity Pamphlet", written by Proponents and Opponents, was printed for all the voters. In the ensuing campaign the measure was hotly debated in every conceivable forum throughout the State; and then it was approved by a decisive majority of all those voting in the general election of 1946. Public opinion was expressed after long deliberation in no uncertain terms.

It is a most important fact that legislation has been enacted in some seventeen States within recent years, directed at preventing the evils that flow from compulsory unionism, that is from compelling men to become members of labor organizations in order that they may be able to earn a living.

Similar Legislation in Other States

• • • The adoption of similar requirements by many states evidences a deep-seated conviction both as to the presence of the evil and as to means adopted to

check it. Legislative response to that conviction *cannot be regarded as arbitrary or capricious and that is all we have to decide*. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment." (Emphasis ours.)

West Coast Hotel v. *Parrish*, 300 U. S. at 399.

See also:

Jacobson v. *Massachusetts*, 197 U. S. 11.

In four states closed-shop agreements are now prohibited by a vote of the people amending the respective State Constitutions:

Arizona, amendment adopted election Nov. 1946.
Arkansas, amendment adopted election Dec. 1944.
Florida, amendment adopted election Nov. 1944.
Nebraska, amendment adopted election Nov. 1946.

In New Mexico the legislature has approved and referred to the people for their approval a proposal to amend the Constitution to prohibit closed-shop agreements.

In twelve States closed-shop agreements are prohibited by legislative enactment:

Delaware, H. B. 212, Laws, 1947.
Georgia, Act. No. 140, Laws, 1947.
Iowa, S. B. 109, Laws, 1947.
Louisiana, Dart's Gen. Stat. Sec. 43812.
Maryland, Ann. Code 1939, Art. 100, Sec. 65.
Nevada, C. L. 1929, Sec. 10473.
North Carolina, H. B. 229, Laws, 1947.
North Dakota, H. B. 151, Laws, 1947.
South Dakota, Ch. 80, Laws, 1945 (Con. Amend. 1947).
Tennessee, S. B. 367, Laws, 1947.
Texas, H. B. 27, Laws, 1947.
Virginia, Ch. 2; Laws, 1947.

Congress has prohibited closed-shop agreements with relation to railroad employees (45 U. S. C. A. 152 Sec. Fifth) and by trustees in bankruptcy with respect to enterprises for which he is trustee (11 U. S. C. A. 672).

Closed-shop agreements are contrary to the policy of the Norris-LaGuardia Act. (29 U. S. C. Sec. 102, 103).

Finally, the Taft-Hartley Act passed by Congress over the President's veto prohibits closed-shop agreements (Act of June 23, 1947).

It is now appropriate to review, first, those allegations of fact and admissions, in the bill of complaint which themselves demonstrate the monopolistic character of closed-shop or union shop contracts, which appellants seek to be free to enforce, and which are made illegal and unenforceable by the Right-to-Work Amendment.

We will review briefly those facts of common knowledge of which the court will take judicial notice, particularly the Federal Statutes and judicial decisions which furnish conclusive proof that contracts which aid labor organizations, either alone or in concert with employers, to monopolize opportunities to work, or to establish non-competitive wages and working conditions and, thereby, monopolistic controls of prices and production, are injurious to the general welfare.

It is *not* our contention that all restraints of trade and all regulations of price or production, which are incidental results of labor organization and collective bargaining, are injurious to the public. Labor unions and their normal activities serve, not only their members, but also, in prevailing opinion, serve to advance the general welfare. So do business organizations. But, when either labor leaders or business managers adopt practices and make agreements which aid in the exercise of monopolistic controls over commerce and which operate "to shift our society from a com-

petitive to a monopolistic economy", *both* labor unions and business corporations can be and should be restrained from such practices and from the making of such agreements. *Allen Bradley* v. *Local Union No. 3*, 325 U. S. 797, 810.

Pertinent Facts Proved or Admitted by the Complaint

Contrary to the contention of appellants, appellees do *not* concede the truth of the allegation of the bill of complaint (Paragraph 15, R. 17), that no labor organization in Arizona "exercises or has any monopoly or control by reason of any union-shop, closed-shop, or union security agreement over the supply of labor, in any trade, craft, occupation or calling." This allegation is not an allegation of fact, but a conclusion of mixed fact and law, which is not admitted by the motion to dismiss, and which is, in fact, contradicted and shown to be false by other allegations of the complaint.

Likewise, the allegation in Paragraph 14 of the complaint, that membership in all labor organizations in Arizona is open to all qualified persons, and that such organizations freely admit qualified applicants, and "impose no arbitrary or unreasonable requirements as a condition to membership"—is also a conclusion of mixed fact and law, which is contradicted and shown to be false by other allegations of the complaint.

In contradiction to the foregoing conclusions advanced by appellants are, for example, the following:

a) The allegations of Paragraph 12 of the complaint (R 13) show that duties and obligations of union members are fixed in the laws of the union and require unionists to refuse to work with non-unionists under penalty of forfeiting their membership if they do so. Also, a union law is quoted to the effect that the union label can only be used by shops and mills having an eight hour day and employing only members of the union

(except on special dispensation granted by a union officer, no such dispensation, it is admitted, having been granted in Arizona).

b) Under the allegations of Paragraph 25 (R. 23) reference is made to the collective bargaining agreement particularly involved in this complaint, which is incorporated by reference to the attached Exhibit 2. The attached Exhibit 2 (R. 57) contains the collective bargaining agreement of November 4, 1946. Section II reads as follows: "The Company agrees to recognize and deal with the Union as the sole collective bargaining agent for all of their planing mill employees in their operations at Phoenix, Arizona, except office workers, shipping clerks, and superintendents, and the Company agrees to continue such recognition during the life of this agreement."

Section III provides as follows: "The Company agrees to have in their employ only members in good standing of the Union, subject, however, to the following terms and conditions."

The first condition is that the Company has a right to determine the competency of all persons to be hired, but it is also provided that the Company has a right to hire a non-union man only "if the Union is unable to furnish a person satisfactory to the Company;" then, it is provided, if a non-union man is hired and survives a probationary period of fifteen (15) days, he shall become a member of the Union.

The second condition in this Section is "Employers agree that any employee who fails to maintain membership in the Union as provided in Section I above shall be discharged upon proper notice given by the Union".

From the foregoing facts, alleged by appellants, it is evident that, contrary to the allegations of the bill of complaint, labor unions which obtain such a collective bargaining agreement seek and obtain, and do "have and exercise" a complete monopoly or control over the supply of labor,

extending from individual employers to an entire industry. Such unions are the sole source from which an employer can obtain a new employee, unless the Union is unable to furnish some one satisfactory to the Company. This means that the Company would be practically compelled to accept any employee tendered by the Union, unless he were obviously incompetent or otherwise seriously objectionable. But, even the feeble possibility that the Company may employ a non-union man is not permitted to relax the union-control over the supply of labor which the Union insists upon. The employer is required to agree that the would-be non-union employee, if acceptable to the Company after fifteen (15) days probation, "shall become a member of the Union." Furthermore, the employer agrees that unless an employee maintains his membership in the Union, he shall be discharged upon request by the Union. This means, in simple language: First, no one can obtain a job without being or becoming a member of the Union. Second, every employee must submit to all the duties and obligations imposed on him by the Union's private laws, or else his membership may be forfeited and thereupon the employer must discharge him at the request of the Union. It is impossible to conceive of any more complete or effective union-control over the supply of labor than that proved by the allegations of the bill of complaint.

Just translate such an agreement into the field of business. Assume that a trade association of buyers attempted to make an agreement with all manufacturers of a certain product, that the manufacturer could only sell to members of the association, or if there were no satisfactory retailer offered to the manufacturer and he chose an independent retailer, that independent must join the association, maintain membership and accept its discipline, or otherwise be stricken from the manufacturer's list of dealers.

Then, make the further assumption that the trade association negotiated a uniform profit for dealers in the form of a uniform discount from the manufacturer's list price, which must be allowed to all dealers. Would there be the slightest question but that such an agreement was a clear combination, agreement and conspiracy in restraint of trade in violation of the anti-trust laws? That is precisely what is accomplished by the closed-shop or union-shop agreements, which the appellant labor unions force upon employers.

If it were not for the special exemption of labor organizations from prosecution under the anti-trust laws, there is no question, in light of the uniform judicial decisions, that all such operations as appellants allege they carry on with the aid of closed-shop or union-shop agreements, would be held in violation of the anti-trust laws, and all such agreements held to be illegal as creating or tending to create an unlawful monopoly and to impose unlawful restraints of trade. (See quotations from judicial opinions *infra*, p. 16, 26.)

Facts of Judicial Knowledge

Facts universally known, of which the Court has judicial knowledge, federal and state statutes and judicial opinions, could be presented in voluminous quantity to show the inevitable and conceded monopolistic effects of closed-shop or union-shop agreements. The notorious exemption of unions from anti-monopoly laws is in itself complete evidence that all union practices, such as efforts to standardize wages and hours, and even by voluntary methods to control the supply of labor, are monopolistic in intention and in effect. But, it has been the prevailing theory throughout the United States that the potential evils involved in permitting any group or class of persons to make monopolistic agreements were outweighed by the benefits which would be conferred upon wage earners, and the advancement of the

general welfare, by the betterment of labor conditions through exempting labor organizations from conformity with anti-monopoly laws applicable to the managers of industry, the employers of labor.

However, the theory behind this exemption of labor unions was that they were *free* associations of workers striving to benefit and to advance themselves without, at the same time, doing injury to the general welfare. One of the major declarations of the rights of organized labor in Section 2 of the Norris-LaGuardia Anti-injunction Act (29 U. S. C. A. 102, 103) declares the public policy of the United States in regard to the individual worker to be that "*although he should be free to decline to associate with his fellows,* it is necessary that he have full freedom of association, self-organization and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment". But, under closed-shop or union-shop agreements, a man who wants to work at his trade is not "free to decline to associate with his fellows". He must join the union and submit to its private laws or he will be denied an opportunity to earn a living.

Under the foregoing public policy, the worker is supposed to have "full freedom of association, self-organization and designation of representatives of his own choosing". But under closed-shop and union-shop agreements, if he wants to associate with one labor organization when another labor organization has the contract, he can't exercise his freedom of association or designate representatives of his own choosing; he must join the union that happens to have the contract. Perhaps 48% of the employees of a craft don't want to be members of the union holding the contract, but they have to remain members and accept the discipline imposed by 52%. Perhaps all the members of an AF of L craft want to associate together and designate their repre-

sentatives; but if a CIO industrial union holds the contract, these skilled craftsmen must accept the terms of their employment laid down for them by an organization dominated perhaps by lower skilled workmen whose fundamental desire is not to raise the wages of the higher paid, but to raise the wages of the lower paid, regardless of the relative value of their contributions. These are obvious examples of the falsity of any contention that a closed-shop or a union-shop agreement is not monopolistic, and the falsity of the claim that appellant unions do not exercise any monopoly-control over the supply of labor in Arizona. For further examples of the notoriously monopolistic character of closed-shop agreements, we refer to the following quotations from judicial opinions:

In the majority opinion, by Mr. Justice Black, in *Allen Bradley Co. et al. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al.*, 325 U. S. 797, it is written:

> "It is true that many labor union activities do substantially interrupt the course of trade and that these activities, lifted out of the prohibitions of the Sherman Act, include substantially all, if not all, of the normal peaceful activities of labor unions. It is also true that the Sherman Act 'draws no distinction between the restraints effected by violence and those achieved by peaceful . . . means,' *Apex Hosiery Co.* v. *Leader*, supra, 513, and that a union's exemption from the Sherman Act is not to be determined by a judicial 'judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.' *United States* v. *Hutcheson*, supra, 232. Thus, these congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do so, both directly and indirectly." (pp. 810-811).

* * * * * * *

"Seldom, if ever, has it been claimed before, that by permitting labor unions to carry on their own activities, Congress intended completely to abdicate its constitutional power to regulate interstate commerce and to empower interested business groups to shift our society from a competitive to a monopolistic economy." (p. 810)

The opinion acknowledges the inconsistency in a law which provides that labor unions alone can destroy competition but not in combination with business groups and comments:

"This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress." (p. 810)

The dissenting opinion by Mr. Justice Roberts indicates general agreement in the court as to the evils that flow from tolerating a monopoly of labor power (in the maintenance of which the closed-shop is a potent instrument). He writes as follows:

"Unless I misread the opinion, the union is at liberty to impose every term and condition as shown by the record in this case and to enforce those conditions and procure an agreement from each employer to such conditions by calling strikes, by lockout, and boycoft, provided only such employer agrees for himself alone and not in concert with any other.

* * * * * * *

"The course of decision in this Court has now created a situation in which, by concerted action, unions may set up a wall around a municipality of millions of inhabitants against importation of any goods if the union is careful to make separate contracts with each employer, and if the union and employers are able to convince the Court that, while all employers have such agreements, each acted independently in making them,

—this notwithstanding the avowed purpose to exclude goods not made in that city by the members of the union; notwithstanding the fact that the purpose and inevitable result is the stifling of competition in interstate trade and the creation of a monopoly."

In *Apex Hosiery Co.* v. *Leader et al*, 310 U. S. 469, the majority opinion by Mr. Justice Stone included the following statement:

"Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization." (p. 502)

In this case the dissenting opinion by Mr. Chief Justice Hughes included the following comment which is extremely pertinent to the present issue regarding the Arizona Amendment:

"When the Union demanded a closed-shop agreement and, on its refusal, declared the strike, only eight of the Company's twenty-five hundred employees were members of the Union. The Company's plant was seized and held for several weeks. Its machinery and equipment were 'wantonly demolished or damaged to the extent of many thousands of dollars.'

"There was not merely a stoppage of production, but there was also a deliberate prevention of the shipment of finished goods to customers outside the State."

In *United States* v. *Hutcheson, et al.*, 312 U. S. 219, the majority opinion by Mr. Justice Frankfurter sustained a

demurrer to an indictment charging a conspiracy in violation of the Sherman Act, on the simple ground of immunity conferred on labor unions by Acts of Congress, stating:

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 (Clayton Act) are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

There appeared to be no question in the *Hutcheson* case that there was a conspiracy in restraint of trade adequately charged. This is quite pertinent to the present issue, because the carpenters union, one of the present appellants, was the alleged conspirator. The strike and boycott in the *Hutcheson* case was to prevent interference by the machinists union with the carpenters union in its monopoly control of jobs. Yet, this is the same union which, in its present complaint solemnly asserts that it has no "monopoly or control" over the supply of labor in Arizona (R. 17), although the union also asserts that its Constitution forbids a member to work with a non-member! (R. 14, 15).

There should be also a limited discussion here of the broad self-serving conclusions incorporated in Paragraph 14 of the complaint to the effect that union membership is open "to all qualified persons" and that the unions freely admit "qualified applicants" and that they "impose no arbitrary or unreasonable requirements as a condition to membership." The definition of who is a "qualified person" and who is a "qualified applicant" is to be found only in the union laws. Assume, as is common, that an apprentice training is required to qualify a worker for a particular job. Assume further, as is common, that limitations upon the number of

apprentices are fixed by union laws. (As an extreme example, reference should be made to the common practice of various unions which give first preference in apprenticeship, and thereby commonly limit apprenticeship, to relatives of their members.) Under these circumstances, who can become a "qualified" applicant, except one whom the union permits to become "qualified"? Therefore, the allegation might just as well read that the unions freely admit those whom they want to admit. It would be difficult, if not impossible, for an employer to claim that an employee was "competent," if under the Union standards he was not "qualified."

For a comprehensive review of the extraordinary "qualifications" which are a prerequisite for membership in many labor unions we refer to an article entitled "The Right to Join a Union" by Clyde W. Summers, 47 Columbia Law Review, Page 33-74.

It is pertinent to note from this article that thirty-two unions with a total membership of 2,500,000 exclude Negroes either by constitutional provision or established practice. This membership is about one-fifth of organized labor. "Twenty-nine unions have some form of citizenship bar." Thirty unions exclude persons because of political beliefs, particularly communists. Eight unions "have constitutional provisions excluding women, but it is generally believed that exclusion of women is more widespread than this number would indicate."

"Probably the most important form of exclusion is the closed union, but it is impossible to determine precisely to what extent this practice exists."

"Denial of the right to join does not always reveal itself in express form, but may be achieved by more subtle devices. A few unions set their initiation fees so high as to effect complete exclusion. Twenty-one unions require an ap-

prenticeship as condition of membership and some of these limit the number of apprentices. Twenty unions require the applicant to pass a competency test, thus enabling the examining committee to exclude any or all of the applicants. All of these devices can be used to effect a closed union, but the apprenticeship and competency requirements are often used to exclude unwanted groups, especially Negroes."

"As has been indicated, the closed union has its greatest strength in the building trades. It is this same type of union which has high initiation fees, apprenticeship requirements and competency tests. Exclusionary practices are concentrated in a relatively small number of trades, but these trades include some of the most powerful unions which control many of the higher paying and more desirable lines of endeavor. It is because of this pattern that the denial of the right to join creates such a serious problem."

Moreover, as heretofore shown, the employer, under the closed-shop contract here involved (R. 60), has no right to hire a non-union man unless the union cannot furnish an employee, and then, if a non-union man is hired, he must become a member of the union. But, it is alleged that the unions "impose no arbitrary or unreasonable requirements as a condition to membership." This is a mere conclusion which has only very limited relevance. In the first place, when the lawmakers decide that a labor union contract is monopolistic because anyone who wants to work must join the union and submit to its private laws, its wage fixing, its price fixing, and its strikes to restrain trade in order to gain private advantage, the lawmakers are little concerned with whether membership is conditioned on reasonable or unreasonable requirements.

If all the businessmen producing one product combined in an association to monopolize control of production and price, it would be of little importance as to whether their

requirements of membership were reasonable or unreasonable. In fact, they would probably make them unreasonable in order to prevent competition. So here, the wrongful character of closed-shop agreements is not made less wrongful if union requirements for admission to membership are reasonable. The intended pertinence of this allegation is, an attempt to show that no one is denied a right to work because he can join a union on reasonable terms. But, here again, the allegation, if true, would be irrelevant. The decisive question is not whether *admission* requirements are arbitrary or unreasonable. The question is: Should a man be denied the right to work unless he submits to the absolute control of a private organization over the terms and conditions of his employment, and even as to whether he shall remain employed, or whether he shall go on strike and remain unemployed in order to carry out some union policy over which he has no individual control.

Appellants quote the famous judicial opinion that "A single employee was helpless in dealing with an employer * * * Union was essential to give laborers opportunity to deal on equality with their employer." (*American Steel Foundries* v. *Tri-City Council, supra*). But, in this day of vast labor unions, unions are almost always composed of more men than are employed by any single employer, and the larger unions include vastly more men than the working force of any employer. As a result a single employee is frequently more helpless in dealing with his union than he is in dealing with his employer. The employer at least always has an interest in maintaining a satisfied cooperative force of employees. The union is often more interested in some large policy than in the welfare of a particular group of workers who may have no quarrel with their employer and yet may be called upon to stop their employment.

It is also obvious that a single employer has now become often as "helpless" in dealing with a powerful union as a single employee used to be in dealing with an employer. Hence, freedom of an employer from coercion to sign a closed-shop contract has become a subject of public concern and a proper subject of legislative action.

Many employers were once inclined to use coercion, and to oppress their employees by forcing inadequate wages and excessive hours of work. Perhaps there are many employers today who would revert to such practices if it were not for the resisting strength of organized labor, backed up by an enlightened public opinion. But, it is also notorious today that large labor organizations are so organized and operated that the ruling officialdom exerts a coercive control over the membership, which individuals and even large groups of workers are helpless to resist. This does not mean that labor organizations should be suppressed or crippled because they are sometimes ruled by tyrannical or self-serving labor bosses or even by criminal racketeers. But, when any organization upon which a man's ability to earn a livelihood depends, becomes so large and subject to such remote and arbitrary controls that the voices and interests of individuals have little influence, there should be, *in any democratic society*, a recognition of the right of the individual to cease to belong to such an organization, and to pay its dues and to be subject to its discipline. It is true that in a *political* society a majority must rule and that a citizen must pay taxes and accept the discipline of public laws; but it is wholly false logic to give to a private labor organization the same standing as a public government in its right to rule its subject members.

Our constitutional government, in order to protect individual liberty, creates individual rights which even the

government may not violate, and imposes limitations upon the lawmaking power of the temporary rulers of federal, state, and municipal governments. But, there are no such public responsibilities, no such constitutional limitations of power upon a private labor organization. Yet, such an organization has a power to tax its members and to discipline them in the earning of a livelihood far beyond any power which citizens have conferred upon any government in the United States. This is not an argument against labor organization, but it is an argument to demonstrate that the exercise of a monopoly control over the supply of labor, and the denial of a right to employment to any except members of a labor union, is the exercise of a private, irresponsible authority, which is destructive of individual liberty and detrimental to the public welfare. The political government, representing all the people and required by the Constitution to preserve the individual liberties of the people, has a right, and indeed a duty, to restrict and prevent monopolistic controls over commerce by any organization; and, above all things, certainly a duty to prevent monopolistic controls of opportunities to earn a living—opportunities which are essential to any real enjoyment of life, liberty, or property.

Labor organizations, like all organizations of citizens, are permitted to function only so long and to the extent that such associations advance the interests of their members without undue injury to, or interference with, the liberties of other citizens. The entire complaint of the appellants demonstrates, not only a capacity to use organized activity to injure others, but a deliberate purpose to injure anyone who will not conform to the private laws of a private organization, to injure him in the most vicious way possible by denying him the opportunity to earn a livelihood. Protestations of beneficent purposes for the advancement of the interests of labor unionists are no answer to the claim

that it is a reasonable exercise of governmental power to forbid the making and prevent the enforcement of monopolistic agreements, which make the general welfare subject to injury or advancement according to the intelligence or good will of a private organization.

The Amendment Is Anti-monopoly Legislation

The primary and obvious purpose of the Amendment is to prevent the use by employers and labor unions of agreements and practices which are essentially monopolistic. Every monopolistic control depends on some means of eliminating competition. To preserve competition in prices, in costs, in quality or quantity of production, is the objective of anti-monopoly legislation. Any device to control or regulate the supply of goods or services for private profit is an instrument of private monopoly subject to prohibition, regulation or toleration in accordance with a legislative judgment which, having a rational basis, is not subject to judicial reversal.

It would be fantastic sophistry to claim that a closed-shop or union-shop agreement is not a potent aid to labor unions and to employers, for separate or joint benefit, in obtaining and exercising monopolistic controls over prices, wages and production. Such agreements may also have other purposes and aid in accomplishing desirable results. The same claim might be made regarding business agreements to eliminate "destructive competition", or to "stabilize" markets, or to establish healthful and reliable standards of production for the benefit of workers and consumers.

But, the courts have sternly set aside all such excuses or justifications for monopolistic practices and universally upheld the power and propriety of legislative prohibitions of contracts and practices which *might* be (even if claimed *not* to be) instrumentalities of monopolistic controls.

The prohibition of monopolies has long been recognized and sustained as a proper field of legislative action in the exercise of the police power of the states:

International Harvester Co. v. *Missouri*, 234 U. S. 199;
Grenada Lumber Co. v. *Mississippi*, 217 U. S. 433;
Liberty Warehouse Co. v. *Burley Tobacco, etc., Co.*, 276 U. S. 71.

And this includes legislation restraining unions and their activities:

Lower v. *Lawlor*, 208 U. S. 274;
Gompers v. *Buck's Stove, etc., Co.*, 221 U. S. 418;
Lawlor v. *Loewe*, 235 U. S. 522;
Duplex Printing P. Co. v. *Deering*, 254 U. S. 443;
Coronado Coat Co. v. *United Mine Workers*, 268 U. S. 295;
United States v. *Brims*, 272 U. S. 549;
Bedford Cut Stone Co. v. *Journeymen S.C.A.*, 274 U. S. 37;
Local 167, etc., v. *United States*, 291 U. S. 293;
Apex Hosiery Co. v. *Leader*, 310 U. S. 469.

"The reasons for this conclusion are as evident as they are conclusive. 'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.' • • • 'The common law has long recognized, as part of the boasted liberty of citizens, the right of every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellowmen, saving such as may result from the exercise of equal or superior rights on their part.'

"It needs no argument to demonstrate that any combination between employers and employed, which creates a condition in a community such as has been hereinbefore described, is a serious menace to the

craftsman or workingman who, in the exercise of his free right of choice, does not wish to join a union. It is calculated to place upon his freedom of choice and action a coercion which leaves him no longer wholly free. Its tendency is to expose him to the tyranny of the will of others, and to bring about a monopoly which will exclude what he has to dispose of and other people need from the open market, or perhaps from any market.

"Monopolies of things of common use and need, whether created by governmental grant or by the acts of private persons or corporations, are odious, and their existence is contrary to public policy. They were condemned by the common law of England, and, although changing in their more common source, have remained under a like condemnation in that country and this to this day. They are especially intolerable where they concern the basic resource of individual existence, to-wit, the capacity to labor. The whole theory of a free government is opposed to them. *Norwich Gas Light Co.* v. *Norwich City Gas Co.*, 25 Conn. 19, 38. Their beneficiaries may enjoy the favors they bestow, and feel injured when deprived of them. But the interest of the public outweighs that of individuals, and the public at large can see nothing but danger in the monopoly of anything of which there is a common need, or which is a common resource of life. This is an old and familiar doctrine in whose maintenance none have as deep a concern as the poor, the humble, and those who live by the labor of their hands. The monopoly need not be complete to come under the ban of the law. * * *"

Connors v. *Connolly* (Conn.), 86 Atl. 600, 604.

And see:

Lehigh Structural S. Co. v. *Atlantic, S. & R. Co.*, (N.J.), 111 Atl. 376, 378;

Curran v. *Galen* (N. Y.), 46 N.E. 297;

Berry v. *Donovan* (Mass.), 74 N.E. 603.

Polk v. *Cleveland R. Co.* (Ohio), 151 N.E. 808;
Slaughter House Cases, 83 U. S. (16 Wall.) 36, 104;
Campbell v. *Motion Pict. Mach. Operators' Union* (Minn.), 186 N.W. 781.

In *United States* v. *Brims*, 272 U. S. 549, the Court held a violation of the anti-trust law an agreement entered into by the carpenters union, builders, contractors and lumber mills in Chicago whereby the carpenters agreed not to install millwork made by non-union labor, and the apparent purpose of which was to eliminate competition from out of state millwork. A similar case was *Local 167* v. *United States*, 291 U. S. 293.

It is true that since the enactment of the Clayton Act and the Norris-LaGuardia Act the Court, *by reason of these Acts*, has narrowed the application of the Sherman Anti-Trust Act as applied to union activities. The enactment of the Clayton Act and the Norris-LaGuardia Act *was necessary* in order to exempt reasonable union activities from the application of the Sherman Anti-Trust Act; and the Supreme Court in applying the Clayton Act and the Norris-LaGuardia Act has recognized restraint of labor activities tending toward monopoly as a proper field of legislation under the police power and has exempted such activities only because of these two acts.

> "The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld" (p. 529).
>
> . . . "'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce *is an economic question which this court need not consider or determine.*' *Northern Securities Co.* v. *United States*, 193 U. S. 197, 337, 338, 24 S. Ct. 436, 457, 48 L. Ed. 679. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbi-

trary or discriminatory *it does not lie with the courts to determine that the rule is unwise* • • • (p. 537).

"The lawmaking bodies have in the past endeavored to promote free competition by laws aimed *at trusts and monopolies*. The consequent interference with private property and freedom of contract *has not availed with the courts* to set those enactments aside as denying due process • • •" (p. 538).

Nebbia v. *New York*, *supra* (pp. 529, 537, 538).

That the monopoly has not yet been achieved does not prevent state action to prohibit it.

"The monopoly used need not be complete to come under the ban of the law."

Connors v. *Connolly*, *supra*.

"It is sufficient if the agreement tends to that end and to deprive the public of the advantages which flow from free competition."

United States v. *Knight Co.*, 156 U. S. 1.

"The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints."

U. S. v. *Trenton Potteries Co.*, 273 U. S. 392, 397.

"• • • Combinations are no less unlawful because they have not as yet resulted in restraint. • • •"

Assoc. Press v. *United States*, 326 U. S. 1, 14.

It cannot be reasonably argued that the creation and exercise of monopolistic controls by labor unions are *constitutionally* exempt from legislative restraints which admittedly can be imposed on business organizations. Unions and corporations are alike associations of human beings

for cooperative advancement of their interests. They have equal rights under the constitution and equal obligations to conform to public policies defined and written into law by legislative authority.

> "The objective of labor monopoly, like business monopoly, is to benefit the monopoly group at the expense of other groups and of the community at large. The method of labor monopoly, like business monopoly, is to acquire control over the supply of an essential service and to raise its price above the competitive level by restricting its supply."
>
> *Martin* v. *Jones*, "Renovated Capitalism," supplement to The Journal of Business of The University of Chicago. Vol. XV, No. 4.

The *policy* of a state or federal government to foster or to discourage certain activities of unions or corporations, because they promote or injure the public welfare, is subject to change as conditions change.

> "Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial, and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed."
>
> Mr. Justice Brandeis, dissenting, in *Truax* v. *Corrigan*, 257 U. S. 312, 354.

There was a time when prevailing opinion induced state and national governments to grant labor unions a sweeping immunity from the restraints of anti-monopoly laws. But in recent years widespread and notorious abuses of monopolistic powers by labor unions have brought a change in public opinion which has been reflected in state and national legislation.

It has been made plain that labor managers, like business managers, may be so selfish, short-sighted, reckless or positively criminal in their purposes and methods that they cannot be permitted to use their economic powers, or to make agreements, in such complete freedom that the public welfare may be seriously injured. Nation wide strikes, depriving the public of essential goods and services, even in time of war, have created a nation wide demand that "something be done" to curb such a private power to bring hardship, suffering and peril to an entire population.

Many strikes in recent years, stopping the production of coal, or transportation or communication, which are matters of common knowledge, have caused a host of legislative proposals to subject labor unions to the restraints of the anti-trust laws, to outlaw industry-wide bargaining and to make illegal closed shop contracts. This developing public opinion has focused upon an obvious source of the monopolistic power of labor organizations that has been so plainly abused, that is, upon the absolute control of the labor supply through closed-shop, union shop, or union security contracts which make it possible for a national labor union to stop the production of food and services in an entire industry.

There may be indefinite argument over what legislation may be most effective and fairest to all concerned as a remedy for these evils. But there can be no serious question that legislation to make unlawful the making or enforcement of any contract which creates or tends to create a labor monopoly, is a reasonable effort to remedy these evils. The adoption of such legislation in the large number of states heretofore listed (p. 9, *supra*) is conclusive evidence of the reasonableness of the Arizona Amendment.

> "The adoption of similar requirements by many states evidences a deepseated conviction both as to the

presence of the evil and as to the means adopted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide."

West Coast Hotel v. *Parrish*, 300 U. S. at 399.

II

The Right-to-Work Amendment is not violative of the Fourteenth Amendment.

When once it is made clear that there are evils to be remedied, for which the Right-to-Work Amendment provides a reasonable remedy, then any complaint that the Arizona Amendment is violative of the Fourteenth Amendment becomes untenable. The law is so well settled, that restraints may be imposed upon liberty of contract and restraints on personal freedom of action, in order to protect persons and the public generally from injuries, that it would be a waste of time to cite the repeated reassertions of this legal doctrine. It should be sufficient to point to the applicability to the present case of the quotations which follow from leading cases.

"The objection that the law is unconstitutional as unduly abridging the freedom of contract in prescribing the particular method of compensation to be paid by employers to miners for the production of coal was made in the case of *McLean v. Arkansas*, 211 U. S. 539, in which this court sustained a law of the State of Arkansas requiring coal mined to be paid for according to the run of mine system according to its weight when brought out of the mine in cars. In that case the constitutional objections founded upon the right of contract which are made here were considered and disposed of. This court has so often affirmed the right of the State in the exercise of its police power to place reasonable restraints like that here involved, upon the freedom of contract that we need only refer to some of the

cases in passing. *Schmidinger v. Chicago*, 226 U. S. 578; *Chicago &c. R. R. v. McGuire*, 219 U. S. 549, and cases therein cited and reviewed."

Rail and River Coal Company v. *Yaple, et al., Constituting the Industrial Commission of Ohio*, 236 U. S. 338, 349.

"Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end has the result of modifying or abrogating contracts already in effect.' *Stephenson v. Binford*, 287 U. S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."

Home Building & Loan Association v. *Blaisdell, et al.*, 290 U. S. 398, 434, 435, 437, 438, 442, 443.

"In *Home Building & Loan Association v. Blaisdell* this Court considered the authority retained by the State over contracts 'to safeguard the vital interests of its people.' The rule that all contracts are made subject to this paramount authority was there reiterated. Such authority is not limited to health, morals and safety. It extends to economic needs as well. Utility rate contracts give way to this power, as do contractual arrangements between landlords and tenants."

Veix v. *Sixth Ward Building & Loan Association of Newark*, 310 U. S. 32, 38, 39.

"* * * The *Blaisdell* case and decisions rendered since (e.g., *Honeyman v. Jacobs*, 306 U. S. 539; *Veix v. Sixth Ward Assn.*, 310 U. S. 32; *Gelfert v. National City Bank*, 313 U. S. 221; *Faitoute Co. v. Asbury Park*, 316 U. S. 502), yield this governing constitutional principle; when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State 'to safeguard the vital interests of its people,' 290 U. S. at 434; is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment."

East New York Savings Bank v. *Hahn et ux.*, 326 U. S. 230, 232.

In addition to the foregoing, particular attention should be called to the fact that this Court has repeatedly sustained laws which prohibit discriminations in employment because of membership in a labor organization.

Texas & N. O. R. Co. v. *Brotherhood of R. & S. Clerks*, 281 U. S. 548;

Virginian R. Co. v. *System Federation R. E. D.*, 300 U. S. 515;

N. L. R. B. v. *Jones & Laughlin S. Corp.*, 301 U. S. 1.

It was once, and not unreasonably, contended that an employer should be free to discriminate against employees, or would-be employees, belonging to certain labor organizations, whenever he felt that membership in such organizations made them undesirable employees (*Coppage* v. *Kansas*, 236 U. S. 1). But, it was held ultimately by this Court that, in the protection of the public interest, an employer could be prohibited from making contracts discriminating against labor unions, and could be prohibited from discriminating against them in the selection and treatment of employees.

The Right-to-Work Amendment presents the converse proposition: that an employer can be prohibited from discriminating against a worker because he is *not* a unionist. This is far more obviously in the public interest, and more obviously the remedy of an existing evil, than the anti-discriminatory legislation previously approved as valid by this Court. Here, the purpose of the law is to prevent contracts, and conduct by employers which have the effect, in the first place, of requiring a man to become a member of, to support and submit to the discipline of, a private organization in order to be able to earn a living; and, second, of providing employers and employees with a convenient and useful instrument for imposing monopolistic controls upon the industries and trades of the States and of the Nation.

III

Right-to-Work Amendment does not impair the obligation of contracts.

In the first place, existing contracts can be made illegal by a proper exercise of the police power. In the second place, the Right-to-Work Amendment only *directly* prohibits the entering into in the future of certain agreements. This could not impair the obligation of an existing contract. It is true, however, that the first clause of the Amendment does have the *indirect* effect of making an existing closed-shop contract enforceable. But, again, the rule of law is well established that all contractual obligations must be held subject to limitation or destruction by a reasonable exercise of the police power. It is certainly sufficient to point out the complete abrogation of contracts by legislation limiting or prohibiting the production or consumption of alcoholic liquor; such laws being universally sustained.

The cases heretofore cited to show that the Arizona Amendment is not violative of the Fourteenth Amendment

(p. 32, *supra*) furnish ample answer to the contention that the Amendment is violative of Section 10, of Article I, which forbids the impairment of contracts.

DETAILED REPLY TO APPELLANTS' BRIEF

The entire brief for appellants is based on a series of propositions, not one of which is true in fact or in law. These propositions are:

1. That the constitutional right of "freedom to assemble" *produces a right* to make contracts which are "indispensable" to accomplish the purposes of assembling.

> "These specific types of contracts are *products* of the right to freedom of assembly which is specifically guaranteed by the Constitution and *may not be abridged.*" (Appellants Brief p. 77)

2. That contracts to exclude non-union workers from employment are "indispensable" to accomplish the purposes of workers who "assemble" as a trade union.

> "In the cases at bar the right to form and maintain a union is necessarily in issue when an *indispensable* element of that right-union membership as a condition of employment—is proscribed. (Appellants' Brief p. 32)

3. That a monopoly of the labor supply is "indispensable" to accomplish the purposes of a trade union "assembly".

> "Workers cannot thrive but can only die under competition between themselves . . . Thus the exercise by workingman of freedom of assembly, to have real meaning, *must comprehend the right* to eliminate wage competition between individual employees and to require adherence to the common rule through the device of union membership as a condition of employment, whereas in the case of business men it will not include

the right to eliminate price competition." (Appellants' Brief p. 43)

4. That all workers "in a mine, mill or shop, or in a craft or calling" are members of a "society" which is "governed" by a union, which all workers must join, and to whose "government" all must submit, if they wish to work.

> "The worker becomes a member of an economic society when he takes employment . . . It is the society of his fellow workers in a mine, mill or shop, or in a craft or calling. The union is the organization or *government* of this society formed by the exercise of the right of association. It is *essential* to the nature of this organization that it include every individual who is a member of the society which it governs". (Appellants' Brief p. 47)
>
> "The common rule of collective bargaining carries with it the legal doctrine that *the union is the* common authority or *government of a society of workers.* It has in a sense the *powers* and *responsibilities* of a *government.*" (Appellants' Brief p. 57)
>
> "We can summarize the nature of union membership as a common condition of employment in an industrial society by again comparing it to citizenship in a political society. *Both are compulsory upon individuals.*" (Appellants' Brief p. 58)

5. That the liberties of the *individual* worker, which are guaranteed under the Constitution of the United States, are inferior to, and subject to the *collective* "constitutional right" of a labor union to govern him.

> "The liberty of the individual is not the right to license, but participation in a social organization founded upon equality, justice and law. *The union is that organization for employees.* It is the product of the exercise of their *right of assembly*, and it is *essential* to the exercise of their *right* to secure equality of bargaining power with employers, that membership in the union be a common condition for all who are in fact

members of the group *governed by the union.*" (Appellants' Brief p. 59)

The foregoing quotations from Appellants' Brief set up doctrines which are (1) utterly hostile to long established principles of constitutional law, (2) completely destructive of the concepts of individual liberty written into our Constitution, and (3) plainly subversive of the Government of the United States. Therefore it should be made plain that these are not the mere lapses or oratorical flourishes of a fervid brief writer. They are accurate samplings of a philosophy written deeply into every page of Appellants' Brief. The same propositions are restated and reargued, for example, as follows:

1. Freedom of Assembly includes right to make "indispensable" contracts. (Appellants' Brief pp. 30, 33, 34, 35, 37, 44, 62, 71, 81, 84, etc.)

2. Closed-shop contracts are "indispensable". (Appellants' Brief pp. 27, 30, 32, 37, 40, 62, 80, etc.)

3. Labor monopolies are "indispensable". (Appellants' Brief pp. 30, 39, 42, 43, 46, 56, 71, etc.)

4. All workers are compulsory members of a "society" which is governed by a union. (Appellants' Brief pp. 46, 47, 57, 58, 59, 71, 73, etc.)

5. The collective "right" of a union to govern is superior to the constitutional rights and liberties of an individual worker. (Appellants' Brief pp. 57, 59, 68, 71, 72, etc.)

Of course the mere statement of such an argument condemns it. But—even more important—the Brief for Appellants demonstrates conclusively, not only the constitutionality of the Right-to-Work Amendment, but also the urgent need for such legislation to prevent labor unions from carrying out their declared intention to "govern" the workers

and the economic life of America, under a specious claim of constitutional *collective* "rights". This claim of the superiority of private laws enacted by an organization of *some* of the people over public laws enacted by the constitutional organization of *all* the people is a negation of the fundamental doctrines of our constitutional, democratic form of government.

It is, therefore, well worth while to analyze carefully each of the five major contentions of appellants and to demonstrate the falsity of their alleged bases in fact and in law.

1. *Freedom to* ASSEMBLE *does not produce a* RIGHT *to make contracts which are* INDISPENSABLE *to accomplish the purposes of assembling.*

Freedom to assemble is *in fact* only freedom for individuals to gather together and to discuss (with free speech) their common desires and intentions and the ways and means to accomplish them. The freedom to take collective *action* depends on the legitimacy of the objects and the means of collective action. If the object or the means involve injury to others, or deprivations of lawfully protected rights of others, the making of contracts or the taking of any other action injurious to others may be forbidden, whether "indispensable" or not.

The *ultimate* object of an assembly may be entirely lawful—such as the object of trade unions to protect and to promote the welfare of the workers. But, if the *immediate* object is injurious to others—such as the object of depriving a community of the necessities of life—it would be insane to suggest that "freedom to assemble" *produces* a "right" to accomplish that immediate wrongful object. Equally irrational would be the contention that if an "assembly" decided that violence and bloodshed were "indispensable" *means* to accomplish its objects, then the right to assem-

ble would produce a "right" to shoot, stab and slug opponents into submission.

In the course of a notable dissenting opinion by Mr. Justice Brandeis, three outstanding liberal-minded Justices of the Supreme Court joined in a statement of law which was certainly not in conflict with the majority opinion because it was simply a summation of well established law.

> "Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." (Dissenting Opinion of Justice Brandeis (with Justice Holmes and Clarke joining) in *Duplex Co.* v. *Deering*, 254 U. S. 443, 488.)

We can be sure that Appellants would contend that a right to strike was at least as "indispensable" to organized labor and as "absolute" as a right to make a closed-shop contract. So it is pertinent to call attention here also to the *unanimous* opinion of the Supreme Court delivered by Mr. Justice Brandeis in *Dorchy* v. *Kansas*, 278 U. S. 306, in which it is flatly stated, at page 311, that:

> "Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike."

It is, of course, the contention of Appellants that the "indispensable" means which they wish to employ is the making of contracts, which is a lawful, indeed a "fundamental" right. But, this argument begs the question, because no one has an *absolute right* to make any contract he pleases. The decisive question is: Will the proposed contract injure others, or violate rights of others, or be destructive of public health, safety and welfare? No "right" to make a particular contract can be founded simply on the right to assemble.

Appellants concede that the right of businessmen to assemble does not produce a right to make price fixing agreements (Appellants' Brief p. 75). Would Appellants contend that a group of small shopkeepers, who are certainly a group of "workers", could "assemble" as a union and agree to stop "cut-throat competition" by selling goods on a basis that would give them adequate compensation (fair wages) for their work? The contention of appellants is plainly that the right of one class of workers to assemble gives them "rights" of collective action which the right to assemble produces for no other class of citizens. But, the *fact* is, and the *law* is, that the Constitution confers equal civil rights on all citizens as *individuals*—no greater right on one class than on another. That is the fundamental doctrine of our Constitution. There is no basis in fact for the claim that the right of workers to assemble has ever been regarded as producing a right to make contracts which other citizens have no right to make. There is also no basis in law for the claim that freedom of assembly produces a right to make any contract that the legislative power determines to be inimical to the public health, safety or welfare. (See cases cited under Point 1 of Appellees Argument.)

2. Contracts to exclude non-union workers from employment are not in fact *"indispensable" to accomplish the legitimate purposes of a trade union.*

The history of trade unionism need not be reviewed to demonstrate that the exclusion of non-union employees from work has always been a major objective of most unions. The *value* of this means of advancing the wages and working conditions of members of unions need not be debated. But the fact that these means are not "indispensable" is also demonstrated by history.

Foremost in this demonstration is the history of the railway labor unions. They grew into one of the most powerful groups of labor organizations ever known, *while adhering to the policy of voluntary unionism.* They organized in many crafts almost every worker, *without any statutory protections of the right of organization.* Then they induced the Congress to enact the Railway Labor Act of 1926 and the subsequent amendments of 1934, and they helped to write into this statutory law a provision forbidding employer coercion *either to prevent* employees from joining a union *or to compel* employees to join a union.

There are many other labor organizations which do *not* seek or obtain contracts by which employers *compel* their employees to join a union. But the single notable example of the growth and power of the railway unions, and the discipline which they maintain, completely refutes the claim that it is "indispensable" to union success to obtain contracts by which employers will *compel* workers to join a union in order to obtain or to hold a job.

Furthermore, the history of unionism shows that the unions waged a long and successful struggle to prevent employers from exercising any power to coerce employees either *not to join* a union, or *to join* only a "collaborating" organization, commonly called a "company union". The

unions made this fight on the ground that the "freedom of labor" required a man to be free to join *or to refuse to join* any labor organization, according to his own, uncoerced judgment. The unions strongly urged and supported the enactment of the Norris-LaGuardia Act which provided explicitly, and declared as "the public policy of the United States", that a worker should have "full freedom of association" and also "should be free to decline to associate with his fellows" (29 U. S. C. A. 102).

Now we find the Appellant labor organization contending that it is "indispensable" to union progress to make contracts with employers under which a man will be denied employment *by the employer*, unless he consents to join the particular union which makes the contract. In a word, the appellant labor organizations are *now* contending that employers have a constitutional right to discriminate against a worker and against unions generally if *one* union requests discrimination in *its* favor.

There is no longer to be any "freedom of labor" which permits a worker to be "free to decline to associate with his fellow workers", although that is the officially declared "policy of the United States". There is no longer to be any "freedom of labor" for a worker to choose the union to which he wishes to belong. Every worker is to be *compelled* to join the union that happens to have a contract with his employer, because, it is now claimed that employer coercion through refusing to employ a non-union worker is the "indispensable" means of forming and maintaining a union (Appellants' Brief p. 32, et seq.).

The entire history of trade unionism and of legislation in aid of collective bargaining and of the freedom of labor to choose its own representatives, demonstrates that employer coercion through closed-shop contracts is neither the "indispensable" nor the desirable means of forming or

maintaining a union. Such contracts are, however, a very *useful* means of establishing and maintaining monopolies of the labor supply and thereby eliminating competition, not only between workers, but also between employers. Such monopolies are not a lawful objective of any organization; and contracts for the purpose of achieving such objectives can certainly be forbidden by law.

3. *Contracts to establish labor monopolies are not "indispensable" to labor unions.*

Appellants, of course, disavow in their complaint any purpose to monopolize the labor supply, or the existence of any such monopoly. But the complaint itself contradicts their own assertions (See Point 1 of this Brief); and their brief argues in clear language that a monopoly of the labor supply is "indispensable" to accomplish the purposes of a union. The disclaimers of the intent to monopolize or of the existence of monopolies, makes ridiculous the entire argument that monopolistic contracts are "indispensable" to union success. But, the extensive argument by which appellants attempt to show that workers "cannot thrive but can only die under competition between themselves", proves that the purpose of closed-shop contracts is eventually to end all such competition by establishing and maintaining universal monopolies of the labor supply.

Thus Appellants are led into the final desperate argument that a legally unrestrained monopoly of the labor supply is not only permissible, but is a constitutional right which is an "indispensable concomitant of the right of workers to assemble into labor organizations". This right to monopolize is not a concomitant of the right of business men to assemble, it is argued, because business men organize to make a "profit", whereas workers organize for "self-protection". (Appellants' Brief p. 75.) Apparently Ap-

pellants believe that when workers assemble for the purpose of increasing their earnings they have constitutional rights which are not available to businessmen who assemble for the purpose of increasing *their* earnings. This is the same theory of class rights which pervades Appellants' whole argument. The fact that the Constitution establishes *equal* rights for all "persons" and no special rights for any class of persons, is simply ignored. Special constitutional rights (not even for all persons gainfully employed, but only for *unionized workers*) are blandly asserted as though the Constitution had already been rewritten by a "dictatorship of the proletariat". Indeed it is claimed that workers, when voluntarily or compulsorily organized, constitute a "society" whose "government" has been made, to a large extent, constitutionally immune to regulation by the political governments established by all the people. This extraordinary claim next merits our attention.

4. *All workers are* not *involuntary "members of a society" which is "governed" by a union.*

The breath-taking argument of Appellants that "the worker becomes a member of an economic society" which a union has a constitutional right to "govern", is developed at great length in Appellants' Brief pp. 47-74. If this were merely a contention that those who *voluntarily* join a private organization must obey its private laws, there would still be needed the qualification that those private laws must be in conformity with public laws. But, Appellants contend, *first*, that this is an "economic society" of which anyone who "takes employment" becomes a member, willy-nilly, just as a person born in a country becomes a citizen; *second*, that obedience to the "laws" of the society is *compulsory* upon individuals; *third*, that the government of this society is vested in the particular union which has collective bargaining rights or powers over his employment; *fourth*,

that the constitutional liberties of American citizens "must be sacrificed for the welfare of this society", that is, must be limited to the extent required by the union which "governs" this "society".

Thus emerges the design of a new form of government. If there were "one big union" it would then govern the entire economic life, and inevitably the political and social life of the nation. But, since there are a great many unions which are autonomous, the governing power of our "economic society" is to be divided among a large number of unions, with overlapping "jurisdictions", which unions will subject the country to the conflicting laws of several quarreling governments. Presumably, however, these unions will all agree that compulsory membership in at least one of their "societies" is an "indispensable" condition of employment, to be enforced (on penalty of starvation), regardless of any individual rights supposedly guaranteed by the emasculated Constitution of the United States.

The doctrine of Appellants is so fantastic that it would not be seriously discussed were it not for the fact that there is a similar doctrine which has gained wide acceptance in other parts of the world. But, let it be said quickly, Appellants are not claiming a right to establish a *communistic* dictatorship of the proletariat as a constitutional exercise of the freedom of assembly. The *communist* program provides for the creation of *one* central government of an economic (and political) society, which government will rule by *public* laws enacted presumably in conformity with a *public* constitution. Such a government could not be established under our present national Constitution.

Appellants, on the contrary, argue that a large number of private organizations have a *right*, under the existing Constitution of the United States, to enact and enforce *private* laws to govern all workers and a right to require

all workers either to submit to those laws or to be denied employment. Appellants assert that a labor union has "the powers and responsibilities of a government" (Appellants' Brief p. 57). The fact is that these unions want to have the "powers" of a government conceded to them; but they are subject to no "responsibilities" comparable to those imposed on *public* governments by constitutions which are written by and for the people to be governed, and which commonly *limit definitely the powers* and *fix definitely the responsibilities* of the government to be established.

To establish the right of private government which is claimed by Appellants would be to destroy the Constitution of the United States, and to end its promise of individual liberty and freedom from every form of private tyranny, that has made American citizenship the greatest heritage that has ever blessed any people. It is unthinkable that such an argument should obtain any sanction from judges sworn to protect and defend the Constitution. It is shameful to think that such an argument can be addressed to the Supreme Court of the United States.

5. It seems needless to argue further that the liberties of the individual worker, which are guaranteed under the Constitution—that his freedom of association, his liberty of contract and his right to work free from servitude to any person or organization—are *not* inferior to, and subject to, any collective "right" of a labor union to govern him against his will. That cannot be the law so long as the Constitution of the United States remains the supreme law of the land.

The Demand for Statutory "Security"

There is one argument in Appellants' Brief which is not irrational, although it advocates a rule of law which cannot be established without abdication of essential powers of

government. Appellants contend that, even if legislation to nullify closed-shop contracts can be constitutionally enacted, such enactments must be accompanied by laws such as the Railway Labor Act or the Wagner Act which provide a statutory "security" for unions in substitution for the "security" they obtain through "union security" contracts.

This is a plausible argument to address to a legislature, but an improper one to present to a court. By that same argument the Wagner Act would have been held unconstitutional because it failed to give employers statutory protections against abuses of union power, when the statute denied employers those powers of self-protection previously available through an unrestricted use of their "fundamental right" to hire and to discharge workers in accordance with their personal preferences.

But, this objection to the validity of the Wagner Act was disposed of by the Supreme Court in the following language:

> "The Act has been criticised as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible; that it fails to provide a more comprehensive plan,—with better assurances of fairness to both sides and with increased chances of success in bringing about, if not compelling, equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy, or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative power. (Many citations) The question in such cases is whether the legislature, in what it does pre-

scribe, has gone beyond constitutional limits." *N.L.R.B. v. Jones & Laughlin S. Corp.* 301 U. S. 1, 46.

Appellants' argument that the Arizona law should be held unconstitutional because in Arizona there is no "statutory protection for union organization or common rules of employment". (Appellants' Brief p. 61) is not only bad in law, but involves a misrepresentation of fact. Arizona has a typical anti-yellow dog contract law which prevents discrimination against workers because they are members of trade unions, thus providing statutory protection for *union* workers, whereas the Right-to-Work Amendment provides an equivalent statutory protection for *non-union* workers. (Sections 56-120 and 43-1608 A. C. 1939)

Conclusion—Constitutional Rights of the Individual Worker

It can hardly be contended that labor unions (which are, in the main, unincorporated associations) have constitutional rights separate from and in conflict with the rights of the individual worker. The contention of appellants must be that individual workers have a right to combine for the purpose of obtaining contracts from employers which will exclude from employment all workers who do not join in the combination.

To state thus candidly the contention of appellants is to demonstrate its fundamental weakness. The most vital, elementary right of every person under the Constitution is certainly a right to work—that is, not a right to compel anyone to employ him, but freedom to seek and obtain lawful employment from any employer who is willing to employ him.

"The liberty mentioned in that Amendment (Fourteenth) means not only the right of the citizen to be free from the mere physical restraint of his person, as by in-

carceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Allgeyer v. *Louisiana*, 165 U. S. 578.

In the light of this statement of constitutional rights the liberty of a worker to join a union must include an equal liberty not to be compelled to join a union.

No one will contend that the State under our Constitution could make it a condition of obtaining employment that a worker must join a private organization, must pay whatever dues are charged, must submit to the discipline of its private laws, must decline to work with anyone not a fellow member, and must leave his employment whenever the organization or its officers decide that he should do so. But, if the State permits the making of contracts whereby all the ordinary opportunities of employment are dependent upon joining a labor union and obeying its private laws, *is not the state, by validating such closed shop contracts, actually violating the Fourteenth Amendment?*

The answer according to the recent unanimous decision of the Supreme Court in *Shelley* v. *Kraemar*, 92 L. Ed. Adv. Opinion 845, appears to be that the government cannot enforce such contracts. In the foregoing "restrictive covenant" case this Court held that an anti-racial covenant was lawful, but unenforceable, because enforcement would violate a civil right guaranteed by the Constitution. It follows inevitably from this ruling that the State could constitutionally enact a law making it unlawful to make

a restrictive covenant which the State cannot constitutionally enforce.

By the same reasoning does it not follow that, since the government could not legally force every worker to join a union, it cannot enforce contracts which have that conceded purpose? Whereupon, it also follows that a law forbidding the making of such a contract, not only does not violate the Constitution but, on the contrary, carries into effect a mandate of the Constitution.

In final analysis it is plain that the liberty of a worker to join a labor union must include the liberty not to join a union; and any public law, or any private law created and enforced by contract, which denies to any person that liberty is violative of a constitutional right which can be and should be protected by law.

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OCTOBER 30, 1948.

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In The

Supreme Court of the United States

October Term, 1948

No. 27

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL., Appellants,

vs.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

Appeal from the Supreme Court of the State of Arizona

No. 47

LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL., Appellants,

vs.

NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA and NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION

Appeal from the Supreme Court of the State of Nebraska

No. 34

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, ET AL., Appellants,

vs.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

BRIEF AMICUS CURIAE OF THE STATES OF MICHIGAN, NORTH DAKOTA, TENNESSEE, UTAH, FLORIDA, and WISCONSIN

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The issues presented in this cause are deemed to be of importance to each of the other states as well as to the states of Arizona, Nebraska, and North Carolina; even to states which may not have the kind of legislation which is under review. The same principles of law which are brought into play with respect to the right-to-work amendment to the constitutions of the three states named will be applicable to

legislation of other states which involves employer-employee relations.

It is our understanding that the constitutionality of the amendment involved in these cases, which provide in general that no person shall be denied employment because of membership or lack of membership in a labor organization, is being challenged on the asserted ground that it violates the appellants' constitutional rights. That constitutes, in essence, an assertion by the appellants of an inalienable right under the constitution to prevent persons who are not members of their organizations from pursuing their chosen method of earning a livelihood. Such an asserted right must lie at the base of a challenge to the constitutionality of the right-to-work amendments, because "He who would successfully assail a law as unconstitutional must come showing that the feature of the act complained of operates to deprive him of some constitutional right." *Aikens v. Kingsbury*, (1918) 247 U. S. 484, 489, 38 S. Ct. 558, 62 L. ed. 1226. In order to make a case, a party can not "assert the constitutional rights" of another. *Newark Natural Gas & Fuel Co. v. Newark*, (1917) 242 U. S. 405, 37 S. Ct. 156, 61 L. ed. 393.

The appellants have come full circle from the case of *Allgeyer v. Louisiana*, (1897) 165 U. S. 578, 589-590, 17 S. Ct. 427, 41 L. ed. 832, in asserting for themselves a constitutional right to deprive employees of rights guaranteed to the latter by the constitution. In the foregoing case the court said:

> "* * * The liberty mentioned in that amendment [The 14th] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace

the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

"It was said by Mr. Justice Bradley, in *Butchers' Union Company v. Crescent City Company*, 111 U. S. 746, 762, in the course of his concurring opinion in that case, that 'The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence; which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen.' Again, on page 764, the learned justice said: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' And again on page 765: 'But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the Fourteenth Amendment."

The purpose of the guarantee of human rights under the constitution is to protect each individual in his personal liberty, rather than to assure to him any power over the liberty of others. The two foregoing objectives are irreconcilable, and utterly impossible of attainment together.

Individual rights may be as thoroughly destroyed, for all practical purposes, by coalitions or monopolies formed by private interests as they can by government. Surely it it would be futile and anomalous to construe the constitution as prohibiting government from infringing upon the right of individuals and at the same time to hold that the same constitution guarantees to private interests a right denied to government.

It was pointed out by this court in *Palko v. Connecticut*, (1937) 302 U. S. 319, 326, 58 S. Ct. 149, 82 L. ed. 288 that the rights guaranteed by the Fourteenth Amendment against infringement through state legislation are only those rights of the common law of so fundamental a nature that "neither liberty nor justice would exist if they are sacrificed." The court said:

> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. *Twining v. New Jersey*, supra, p. 99. * * *"

In the words of the court in that case, p. 328, the test with respect to the constitutionality of any specific legislation is:

> "Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'."

Surely the right of an organization to compel citizens of the United States to join its ranks in order to have the privilege of earning a livelihood is not a right grounded in the fundamental principles of liberty and justice protected by the constitution, but rather it is an arrogation of privilege which would have the tendency to defeat such a right in others.

Were state government to enact legislation providing that no person could be employed within its boundaries unless he should become affiliated with, and pay tribute to, a particular organization, such legislation would, we believe, be prohibited by the Fourteenth Amendment as an abridgment of the individual's right "to live and work where he will; to earn his livelihood by any lawful calling," recognized in *Allgeyer v. Louisiana, supra.* Surely a state may make laws for the practical protection of individual rights recognized by the constitution. The infringement of individual rights by private interests is, in the absence of legislation to the contrary, lawful; but that does not mean the constitution guarantees a perpetual continuance of that circumstance. The fact that the constitution does not of itself *prohibit* the appellants from overriding the rights of others should not be translated into a constitutional guarantee that they are immune from legislative regulation.

The purpose of the constitution is served, rather than infringed, when the legislature acts to protect the right of an individual, which the government itself could not violate, from violation by others. It was pointed out in *Nebbia v. New York*, (1933) 291 U. S. 502, 538-539, 54 S. Ct. 505, 78 L. ed. 940, 89 A. L. R. 1469, that:

> "* * * The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. * * *"

This court held in *Railway Mail Assn. v. Corsi*, (1945) 326 U. S. 88, 65 S. Ct. 1483, 89 L. ed. 2072, that the constitution does not preclude regulation of labor organizations so as to prevent them from denying to individuals rights affecting their ability to earn a livelihood.

The legislation in the foregoing case prohibited unions from excluding individuals from *membership* because of race, creed or color. The legislation here involved prevents exclusion of individuals from *jobs* because of lack of union membership. The objective in both cases is to preserve to the individual free access to jobs. Surely, if a legislature may regulate the internal affairs of a union to the extent of proscribing exclusions from membership, it may regulate *to the same end* by proscribing such an organization from establishing a monopoly of jobs so as to prevent non-members from free access to a means of livelihood. We believe that what was said in the foregoing case with respect to state legislation directed toward preventing discrimination based on race, creed or color is equally applicable to legislation preventing discrimination based on non-membership in a particular labor organization. The same principle there

enunciated could be applied to the present situation with very slight change in wording:

> * * * A judicial determination that such legislation violated the Fourteenth Amendment would be a *distortion of the policy manifested in that amendment*, which was adopted to prevent state legislation designed to perpetuate discrimination * * *. We see no constitutional basis for the contention that a state cannot protect workers from exclusion * * * [from jobs] solely on the basis of * * * [non-membership in a particular group,] by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees. (cf. 326 U. S. pp. 93-94) (Emphasis added.)

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See also:

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